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Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

October Term, 1988

EMMA F. GILMERE, individually, and as Administratrix of the Estate of Thomas Patillo, and for the benefit of his next of kin,

Petitioner,

vs.

CITY OF ATLANTA, GEORGIA, R.C. SAMPSON and C.C. CRAIG, individually and in their official capacity,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether binding precedent of this Court mandates that a prevailing Plaintiff, in a civil rights wrongful death case, be entitled to state statutory damages for the wrongful death claim or similar compensatory damages for the deprivation of life claim when the state statutory remedy is otherwise consistent with Section 1983 policies.

2. Whether the lower courts correctly construed the facts and applied the rules of pleading and practice in failing to award the prevailing Plaintiff state statutory damages for wrongful death and/or deprivation of life of the decedent.

3. Whether a judgment against a police officer acting in his official capacity should be due and payable by the Defendant City under the facts of this case.

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2. The decision below is in conflict with decisions of this Court and lower federal courts in failing to correctly construe the facts and apply the rules of pleading and practice so as to deprive a prevailing plaintiff of state statutory damages for wrongful death and/or deprivation of life.	30

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Petitioner

v.

CITY OF ATLANTA, GEORGIA, R.C. SAMPSON and C.C. CRAIG, individually and in their official capacity,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Emma F. Gilmere, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered March 6, 1989.

OPINIONS BELOW

The opinion of the United States District Court, Northern District of Georgia, entered on July 14, 1987 (R3-597-1), amended August 27, 1987 (R3-600-1) is set out in Appendix III hereto. The opinion of the United States Court of Appeals for the Eleventh Circuit was entered January 30, 1989 in Gilmere v. City of Atlanta, 864 F.2d 734 (11th Cir. 1989)[1], and is set out in the Appendix IV. Motion for Rehearing and Rehearing In Banc was denied on March 6, 1989, and

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[1]The 2-1 split panel decision was authored by a district judge, Honorable Jose A. Gonzalez, Jr., U.S. District Judge for the Southern District of Florida, sitting by designation. Voting with him to defeat Plaintiff's claim was Honorable Peter Fay, Judge, Eleventh Circuit Court of Appeals. Judge Fay was one of the four dissenters in the in banc appearance of this case who would deny a civil rights Plaintiff in a death case a cause of action under the United States Constitution. Gilmere v. City of Atlanta, 7774 F.2d 1495 (11th Cir. 1985) (in banc).

is set out in the Appendix V. This is the second appearance of this case in this Court. See Gilmere v. City of Atlanta, 774 F.2d 1495 (11th Cir. 1985) (in banc), cert. den. 476 U.S. 1115, 106 S.Ct. 1970 (1986) and is set out in Appendix II. See also Sampson v. Gilmere, 476 U.S. 1124, 106 U.S. 1993 (1976), denying the Defendants petition for certiorari. The original orders of the district court of June 21, 1982 and August 9, 1982 are set out in Appendix I.

JURISDICTION

This is a Petition For a Writ of Certiorari timely brought under Rule 20, Revised Rules of the Supreme Court of the United States. Petitioner seeks to have the Court review the order of the United States Court of Appeals For the Eleventh Circuit entered on January 30, 1989, rehearing denied, March 6, 1989. This

court's jurisdiction is invoked pursuant to 28 U.S.C. 1254.

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS

The split panel decision in this case was rendered on January 30, 1989, after oral argument. Gilmere v. City of Atlanta, Georgia, 864 F.2d 678 (11th Cir. 1989) (No. 87-8614). On remand from the Eleventh Circuit in Gilmere v. City of Atlanta, Georgia, 774 F.2d 1495 (11th Cir. 1985) (in banc), cert. den. 476 U.S. 1115, 106 S.Ct. 1970 (1986), the district court entered its findings and judgment on July 14, 1987, as amended August 27, 1987.

In the first appeal the in banc Eleventh Circuit upheld the district court's ruling that the decedent "died at the hands of an Atlanta policeman." Id. 774 F.2d at 1505. For this death this

Court held that there is a cause of action under Section 1983 because "the intentional infliction of personal injury and death by means of excessive police force ... resulted from exactly the sort of official brutality which prompted passage of the Act." Id. 774 F.2d at 1498,99.

After deciding the primary issues in Plaintiff's favor, but reversing as to municipal liability, the in banc Court remanded this case to the district court to determine damages, costs and attorney's fees, noting that there were constitutional violations and state tort causes of action not considered by the district court. Id. 774 F.2d at 1505.

On remand, in its final judgment and order the district court failed to award any additional damages for the deprivation of life, the other

constitutional claims or the pendent state law claims. Thus the district court again awarded $20,000 for the shooting and killing against Defendant Sampson, $1,000 against Defendants Sampson and Craig for the beating and $4,000 in punitive damages for the same. (R3-598-1, 3-601-1).

On the second appeal, to which this Petition is directed, a split panel affirmed the award of $20,000 for the death, holding that the Courts in this circuit are not bound by statutory damage remedies. Gilmere II, 864 F.2d at 740. The split panel also refused to award damages for the further constitutional deprivations found by the in banc court and refused to award further damages for the state tort claims on the grounds that wrongful death was never pled. Id.

The split panel did affirm the number of hours awarded for trial level work, but reversed the $40 hourly rate as it "greatly contradicted" the Court's "knowledge and experience". Id. 864 F.2d at 742. The panel also reversed the awards of $2,500 for attorney's fees on appeal and $2,500 for attorney's fees on remand work, as the panel said the district court's order was not specific enough to enable review. Id. 864 F.2d at 742.

II. STATEMENT OF FACTS

On New Year's Day, 1980, Thomas Patillo was forcibly removed from his house during an police investigation and then was shot and killed by R.C. Sampson, an on duty police officer employed by the City of Atlanta.[2]

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[2]A major factual hurdle in this case was why the defendant officer would draw his gun at point blank range, shove it in Decedent's abdomen and fire. Discovery

Thomas Patillo, a black male, was born in West Point, Troup County, Georgia, and was 38 years old at the time of his death. (T148) Mr. Patillo graduated from high school, and attended one year at Muscogee Vocational School, where he studied auto mechanics and masonry. (T186)

Mr. Patillo had lived in Atlanta since 1974. At the time of his death he was making $125.00 per week and had been scheduled to receive a raise to $175 effective the date he was killed. (T217) Mr. Patillo was characterized as a good worker, sober and had no criminal record. (T182, 217)

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in a later case, Sims v. City of Atlanta, C.A. No. C82-2538A (N.D. Ga.), involving this same Defendant-officer has revealed that this officer had previously pulled his gun and used the barrel to punch an arrestee. Although this previous incident happened before the killing in this case, the incident was not disclosed by the Defendants in this case.

Mr. Patillo never married not had any children and his parents were no longer living at the time of his death. (T1000) He was in good health at the time of his death and would have been expected to live another 33.97 years according to the Commissioner's 1958 Standard Mortality Table. (T150, P. Ex. 45) Patillo was described as friendly and close to his family. (T182) Mr. Patillo had lived with his sister for several years and had made recent contributions to her household. (T204) Although he was not athletic or very strong, he enjoyed bowling and playing basketball. (T181, 190)

Mr. Patillo was at home New Year's Day, 1980, when Officers Sampson and Craig removed him from his home and beat him about the head and body. The medical examiner's report corroborated the

witnesses' testimony that Patillo was beaten before he was shot. (P. Exs. 21,23)

Patillo was shot two times by Defendant Sampson and died from a gun shot wound to the abdomen which cause a fatal loss of blood. (P.Ex. 21, pp. 3-5) The medical examiner testified that efforts could have been made to stop the bleeding and that this would have been the appropriate action. (Metcalfe Dep. p. 10). However, neither Craig nor Sampson did anything but check Patillo's pulse, which indicated that he was still alive. (T1141) Patillo was pronounced dead sixty minutes after he was shot and thirty minutes after he was pronounced dead at Grady Hospital. (P. Ex. 21)

Evidence at trial demonstrated that Patillo's funeral cost $4,095.53, and his gravestone cost $575.00. (P. Ex. 6,7,

T190,191) Lost future earnings to Mr. Patillo, calculated at the rate of $175.00 per week for 33.97 years, equal three hundred and nine thousand and one hundred twenty seven dollars ($309,127).

The voluminous evidence summarized above was presented at trial without objection to show the value of decedent's life.

Plaintiff invoked the district court's pendent jurisdiction over her state law claims in Paragraph 2 of Count I of her complaint, stating that: "This complaint sets forth certain causes of action arising under the Constitution and laws of Georgia which are based on the same facts giving rise to the federal causes of action contained herein. The Court's pendent jurisdiction gives it power to determine these causes of action and the same is hereby invoked." (R7)

The Plaintiff went on to allege the wrongful death of Thomas Patillo in Count I of her complaint. (R7-14)[3]

The complaint specifically refers to the violation of the Decedent's rights under Georgia law in paragraph 20: "Said acts were an illegal and excessive use of force under the laws of Georgia." Plaintiff goes on in paragraph 23 to assert that "The Plaintiff has suffered the loss of her brother and is entitled to recover damages for the wrongful death." Paragraph 24 again alleges the wrongful death claim and specifically requested a recovery for the full value of the life of the decedent as specifically provided by Georgia law: "(T)he defendant's (sic) actions are the proximate cause of the death of THOMAS E.

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[3]See particularly paragraphs 13, 14, 20, 23 and 24 of the original complaint. (R7-14)

PATILLO and the Plaintiff is entitled to recover the full value of his life, and funeral and medical expenses and damages." (R13)

A verdict for the Plaintiff was entered on June 25, 1981, including a Plaintiff's verdict on the wrongful death claim, but the District Court held that state law prohibited the court from awarding state statutory damages to the next of kin. (R409, 433) In fact, in the original order of June 21, 1982 (Appendix I) the district court made it clear that Plaintiff had prevailed on the wrongful death claim but was only refusing to award state statutory damages because of the court's misreading of the Georgia statute O.C.G.A. 51-4-5. (R409, 433)

Plaintiff then filed a timely motion to alter or amend judgment pursuant to Rules 52(b), 69(e) and 60(b)(1), of the

Fed. R. Civ. P., and as grounds cited the district court's error of law in failing to assess state statutory damages for wrongful death (R409). In that order the district court had admittedly erroneously found: "(Patillo, however, left neither widow nor children and his brother and sisters are not given a wrongful death action by 105-1302 (now O.C.G.A. 51-1 et seq.)" (R402)

The district court then admitted that it had made a mistake saying: "This court was not aware that this limitation had been effectively removed from Ga. Code Ann. 105-1309. (now O.C.G.A. 51-4-5)" (R433) "Thus the court erred in relying on Sec. 105-1302", the court concluded. (R433)

Moreover, this case was also tried on the wrongful death claim without objection. By request of the Court, both

parties filed written Proposed Findings of Fact and Conclusions of Law. (R147) In conformance with Local Rule 181.2 (N.D.Ga.) these were filed before trial. The proposed findings of the Plaintiff said: "Besides the action for deprivation of constitutional rights under the Fourth, Eighth and Fourteenth Amendments, for the deprivation of life, for excessive force and for false imprisonment, Plaintiff brings several pendent state claims, including **wrongful death**, assault battery, false arrest and false imprisonment all arising out of the same nucleus of facts." (R147) "These damages are also available to plaintiff for the pendent state cause of action except as to wrongful death claim for which Plaintiff is entitled only to the full value of the life of deceased. Ga.

Code Ann. 105-1308. (now O.C.G.A. 51-4-1)." (R158)

At trial, the court specifically found that such a cause of action was pled. (T1315) In fact the district court said at trial that it intended to bind the parties to the causes of action stated in the proposed findings. (T1380) The only objection ever raised on this subject came from Defendant Craig, who was the only defendant not represented by the City's attorneys, and that objection, as to whether Plaintiff was the proper party to bring the wrongful death action, was overruled by the trial court. (T1315,1380)[4]

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[4]Defendant Craig has never filed any notice of appeal to any ruling in this case and has never filed any briefs or pleading, nor made an appearance. Yet, the Eleventh Circuit Court of Appeals has never acknowledged this fact and has continued, in spite of objections, to treat him as the other Defendants-Appellees.

A written motion for Directed Verdict was filed by the Plaintiff in which Plaintiff stated: "Plaintiff has proved by a preponderance of the evidence the constitutional violation of wrongful death." (R133) The directed verdict motion also said: "Plaintiff has proved by a preponderance of the evidence the requisites of the pendent state claims of wrongful death. (R133)

III. FACTUAL MISREPRESENTATIONS BY THE APPELLATE COURT

In support of its position the majority opinion cites just one allegation that the wrongful death cause of action was not pled[5] or tried. (Slip

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[5]In fact other death actions brought under 42 U.S.C. 1983 have pled the wrongful death claim in the same manner and language as contained in Petitioner's complaint herein. These cases have included the wrongful death claim under the constitutional deprivation of life claim, without giving it its own numbered or paragraphed cause of action. See e.g., McQurter v. City of Atlanta, 572 F.Supp. 1401 (N.D.Ga. 1983), aff'd. 724

opinion, p. 1305). However, the objection referred to was not made by "counsel for appellees", as the majority asserts, but was made by counsel for Defendant Craig and not by the City of Atlanta or the other defendants or attorneys. Moreover, Defendant Craig has never filed a notice of appeal nor ever participated in any appeal of this case.

Moreover, the objection, came when Plaintiff introduced evidence of funeral expenses, and was not that Plaintiff did

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F.2d 881 (11th Cir. 1984); Anderson v. City of Atlanta, 778 F.2d 678 (11th Cir. 1985). It would seem unnecessary to set out the wrongful death cause of action as a separate pendent claims as pendent claims are lesser claims such as assault, battery, false arrest, etc. which do not rise to a constitutional level. Perhaps if there was ever a killing that did not rise to a constitutional level it might be necessary to plead wrongful death separately.
See Williams v. Kelly, 624 F.2d 695 (5th Cir. 1980), cert. den. 451 U.S. 1019 (1981). However, that was not the case here as the killing did rise to a constitutional deprivation.

not plead a wrongful death cause of action, but that there was no "Prayer for damages for wrongful death" in the complaint." Gilmere II, 864 F.2d at 737. However the panel majority does not even mention the fact that this objection was **overruled** by the district court during trial. (R1380)

Evenmoreso this particular "factual finding" by the appellate court is duplicitous as on the previous page the majority opinion held and noted that: "The complaint goes on to demand recovery of the full value of the decedent's life, and funeral and medical expenses and damages." Id. 864 F.2d at 737.

REASONS FOR ALLOWANCE OF THE WRIT

I. Binding Supreme Court rulings mandate that state statutory damages be awarded in deprivation of life claims brought under 42 U.S.C.1983, rather than fashioning a remedy on a case by case basis.

The award of $20,000 for the killing of the 38 year old black decedent "shocks the conscience". The majority panel opinion is a complete repudiation of the rulings of this Court as well as binding precedent of the Eleventh Circuit. As the dissent in this case, by Judge Clark, eloquently points out:

> The majority opinion joins the district court in repudiating 42 U.S.C. § 1988, binding circuit authority, and Supreme Court cases that dictate application of state law when assessing damages in § 1983 cases whether federal law or policy neither controls nor conflicts and state law provides an analogue. *** Yet the most grievous part of the majority opinion is its result: there is now no law in the Eleventh Circuit governing assessment of damages in a § 1983 wrongful death case. Gilmere II, 864 F.2d at 744,(J. Clark dissenting).

In Burnette v. Grattan, 468 U.S. 42, 47, 104 S.Ct. 2924 (1984), this court defined a "Three step process" for the courts to follow in determining the law applicable to civil rights cases as directed by Section 1988. This "process" was cited with approval in Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938 (1985). Since there is no dispute as to the first two steps in the process, i.e., the determination that federal law is "deficient" and identification of the applicable law of the forum state, the holding in Carey v. Piphus, 435 U.S. 247 (1978) should end the inquiry. The Supreme Court noted therein that common law tort rules may not be a complete answer to damage remedies in every case.

Since the decedent's constitutional interest in his life closely parallel the

interests behind the state tort of wrongful death, the state tort rules of damages should apply. This is not a case where no analogous tort law exists, such that the task of "adapting" the state rules need not be undertaken. Id. 435 U.S. at 257. Wilson dictates that state law is to be applied unless it is inconsistent with the Constitution. Id. 105 S.Ct. at 1942.

As the dissent in Gilmere II pointed out the majority relied on "broad and inapplicable, statements by the Supreme Court" in depriving Petioner of her lawful damages. Id. 864 F.2d at 746 (J. Clark, dissenting).

The majority opinion claims that it is free to disregard state law because state law is unsound as a policy matter because reliance therreon will mean that plainitffs in one state can recover more

than plaintiffs in another. Id. 864 F.2d at 739, 740. However in numerous cases this Court has already upheld these state by state distinctions in damage remedies in Section 1983 cases. See e.g. Robertson v. Wegman, 436 U.S. 584 (1978). If the majority opinion stands then the courts below have the license to ignore settled interpretations that have allowed states deference in pleading and practice.

Clearly the majority opinion below has resulted "in casting the district courts to sea without an anchor." Gilmere II, 864 F.2d at 747, (J. Clark, dissenting). "Without a standard to determine the amount of damages, the possibility of arbitrariness is is increased." Id. This approach was specifically rejected in Wilson v. Garcia, supra, 471 U.S. at 277: We conclude that the statute is fairly

construed as a directive to select, in each State, the one most appropriate stgatute of limitations for all section 1983 claims. The federal interests in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored this simple approach."

The compensable interests arising from the deprivations of Thomas Patillo's rights include inter alia, his right to be let alone, his right to bodily integrity, his right not to be subjected to excessive force, his right not to be unreasonably seized, his right to liberty, his right to be free of bodily restraint, his right to the use of all his faculties, and his right to life itself.

Each of these interest belonged to the decedent. However, the surviving

Plaintiff who is entitled to bring this action may assert both the injuries which Thomas Patillo received prior to his death (on Patillo's behalf), as well as the estate's and survivors' interests in recovering for the denial of Patillo's life.

In Robertson v. Wegman, 436 U.S. 584 (1978), this Court recognized the existence of all three sets of intertests. While addressing a factual situation where the death of the Plaintiff was unrelated to the constitutional deprivation alleged in the lawsuit, the Court identified that the purpose of Section 1983 is to compensate victims for the deprivation of their federal rights. The Court acknowledged that actions will survive and allow compensation to the estate or personal representative of the deceased when state

law allows. Finally, the court acknowledged the right of survivors to use under Section 1983 for the injury to their own interests. While refusing to find state law on abatement inconsistent with federal policies in that case, the Court carefully distinguished cases, such as the instant action where the "deprivation of federal rights caused death." Id. at 592-594.

All previous wrongful death cases in the Circuit Courts addressing damages have applied state law. See e.g. Brazier v. Cherry, 293 F.2d 401, 409 (5th Cir. 1961), cert. den. 368 U.S. 921, 82 S.Ct. 243 (1961); McQurter v. City of Atlanta, 572 F. Supp. 1401, 1422 (N.D. Ga. 1983, appeal dismissed, 724 F.2d 881 (11th Cir. 1984).

A conclusion that state statute regarding the measure of damages is

inconsistent with federal policies behind section 1983 because it overcompensates those victims of constitutional injuries would be unique. In fact numerous federal courts have found that state law limitations on recovery of damages for survival actions and wrongful death are inconsistent with federal policies underlying Section 1983, and therefore the damage remedy must be supplemented in actions resulting in death under Section 1983. Bell v. City of Milwaukee, 746 F.2d 1205, 1238 (7th Cir. 1984); Guyton v. Phillips, 532 F.Supp. 1154 (N.D. Cal. 1981): Heath v. City of Hialeah, 560 F. Supp. 840 (S.D. Fla. 1983); O'Connor v. Several Unknown Correctional Officers, 523 F. Supp. 1345 (E.D. Va. 1981); Sanchez v. Marquez, 457 F. Supp. 359 (D. Colo. 1978).

Fundamentally, of course, the injury to Mr. Patillo, which resulted in his death "constituted the most serious harm possible." Gilmere I, 774 F.2d at 1501. "As a general matter, we discern no reason why a person whose federally guaranteed rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action." Smith v. Wade, 461 U.S. 30,48 (1948).

It is well established that "(t)he goals of the federal statutes are compensation of persons whose civil rights have been violated, and the prevention of the abuse of state power." Burnette v. Grattan, supra 468 U.S. at 49. Therein the Supreme Court went on to say, citing Robertson v. Wegman,supra 436 U.S. at 590, that "the central objective of the Reconstruction era civil rights

statutes ... is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief." Id.

The interests behind Section 1983 in both compensation and deterrence are not readily severable and the Supreme Court has had no reluctance to award substantial monetary damages both to compensate for the deprivation and to deter such wrongdoing in the future. Memphis Community School District v. Stachura, 106 S.Ct. 2537, 2543,44 (1986). If the compensatory award is not substantial the statute's deterrent purpose would be defeated. There is no claim more significant than that alleging the deprivation of life; nor one that more demands deterrence.

As the dissent emphatically points out, the award of damages in this case must be reversed because the award "minimizes the value of human life" and "shocks the conscience." Gilmere II, 864 F.2d at 747,748 (J. Clark, dissenting). In contrast, in Trezevant v. City of Tampa, 741 F.2d 336, 341 (11th Cir. 1984) an opinion written by Judge Fay, the only concurring Circuit Court judge in this case, a damage award of $25,000 was awarded to a man who had been denied medical treatment for his twenty-three minutes of incarceration.

2.The Courts below erred and ignored binding precedent of this Court and the Circuit Courts in failing to award state statutory damages for the wrongful death claim.

The dissenting opinion of Judge Clark precisely characterizes the result implicated by the decisions appealed from

in this case as "justice turned bottom side up." Gilmere II, 864 F.2d at 748 (J. Clark, dissenting). And as the dissent points out, the question of whether a wrongful death cause of action was pled and tried was never raised until after judgment when the district court mistakenly ruled that the Plaintiff could not recover statutory damages for wrongful death because Georgia statute allowed only the wife and children to recover statutory damages. Id. 864 F.2d at 744. Compare O.C.G.A. § 51-4-5.

In support of its position, the majority cites only one allegation that the wrongful death cause of action was not tried and that is itself a gross mischaracterization of what actually happened. Id. 864 F.2d at 737. The majority opinion does not even address the more than one dozen citations to the

record concerning the wrongful death claim that Plaintiff set out in the facts above. The objection referred to was not made by "counsel for appellees", as the majority erroneously asserts, it was made by private counsel for Craig and not by the City of Atlanta and the other Defendants or their attorneys. And as Plaintiff has pointed out, ad nauseam below, Craig never appealed. Moreover the objection, when Plaintiff introduced evidence of funeral expenses, was not that Plaintiff did not plead a wrongful death cause of action, but that there was no "prayer for damages for wrongful death" in the complaint. Id. 864 F.2d at 738. But the most relevant fact is not even mentioned by the panel majority and that is the objection was **overruled** by the district court. That is the district court ruled that it would bind the

parties to the causes of action as set out in the pre-trial order that specifically included a wrongful death claim. Thus the finding by the Circuit Court seems duplicitous at best, since on the previous page of the majority opinion it was held that: "The complaint goes on to demand recovery of the full value of decedent's life, and funeral and medical expenses and damages." Id. 864 F.2d at 737.

This Court's decision in United States v. United States Gypsum Company, 333 U.S. 364 (1948), established the standard for appellate review of fact findings. "A finding is clearly erroneous where, although, there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Id. 395. It

follows that the clearly erroneous rule is demanded where there is a total lack of evidence to support the ruling. Duke Power Company v. Carolina Environjmental Supply Group, 438 U.S. 59 (1978).

There is no requirement that Plaintiff's claims for wrongful death under 42 U.S.C. 1983 and those under Georgia law must be pled separately. "A party may set forth two or more statements of a claim ... either in one count ... or in separate counts." Rule 8(e)(2), Fed. R. Civ. P. Furthermore, pleading are to be judged by their substance, not their form or label, and should be construed to give effect to all allegations. United States v. White County Bridge Commissioner, 275 F.2d 529 (7th Cir. 1960). "The Federal Rules of Civil Procedure demand a liberal construction of the pleading, requiring

only that they give a fair notice of what the evidence is expected to show." Wansor v. George Hantscho., Inc., 570 F.2d 1202, 1208 (5th Cir. 1978), cert. den. 439 U.S. 593 (1979) Accord Schwartz v. Sears, Roebuck & Co., 669 F.2d 1091, 1092 (5th Cir. 1982) where the complaint was construed to plead a theory of gross negligence in design because the complaint "should have put Sears on notice," even though not specifically pled. "The spirit of the Federal Rules of Civil Procedure require us to construe the pleading in any given case strongly in favor of the pleader." Metropolitan Life Insurance Co. v. Fugate, 313 F.2d 788, 795 (5th Cir. 1963).

At the direction of the district court all parties filed Proposed Findings of Fact and conclusions of law (R147). This was in conformance with Local Rule

181.2 (N.D. Ga.). In fact, the district court stated that it intended to bind the parties to the causes of action plead in the proposed findings. (T1380) Plaintiff's proposed findings stated: "Besides the action for deprivation of constitutional rights under the Fourth, Eighth and Fourteenth Amendments, for deprivation of life, for excessive force and for false arrest and imprisonment, Plaintiff brings several pendent state claims, including wrongful death, assault, battery, false arrest and false imprisonment all arising out of the same nucleus of facts." (R 147)

Therefore, the issue was tried by implied consent. Rule 15(b), Fed. R. Civ. P.; Norris v. Bovine Feeders, 492 F.2d 502, 506 (5th Cir. 1974). The Eleventh Circuit has held that an amendment must be allowed when issues are

actually tried either by express or implied consent. Florida East Coast Ry. Co. v. Greene, 772 F.2d 750 (11th Cir. 1985).

It would appear that neither the panel majority nor the district court followed the in banc remand. The issues raised here concerning damages were raised in the original appeal and before the in banc circuit court. In its opinion the Circuit Court said: "We accepted this case for in banc consideration primarily to determine whether Parratt ... precludes a claim by his administratrix under 42 U.S.C. § 1983 because state tort law provides a comparable remedy." Gilmere I, 774 F.2d at 1496. However, the Circuit Court specifically noted that Plaintiff had a cause of action under the Fourth Amendment for the injuries received, a

claim not recognized by the trial court in assessing damages. Id. 774 F.2d at 1502. Also the in banc circuit court instructed the district court to "reexamine the state tort claims on remand." Id.

In their decision the Court took pains to point out that "section 1983 claims involving a violation of an enumerated constitutional right were substantively different from those based solely on fourteenth amendment due process." Id. at 1502. And as the in banc Court held in this case "violations which give rise to substantive due process claims are necessarily more egregious than those which give rise to simple tort actions." Id. at 1500.

Thus panel majority in Gilmere II and the district court, have in effect,

ignored the in banc Circuit Court's directive.

3. The judgment in this case should by due and payable by the Defendant City.

The panel opinion summarily dismissed Petitioner's argument that the judgment should be awarded against the City holding that prior Supreme Court rulings and precedent of the Circuit Court were "frivolous." Gilmere II, 864 F.2d at 742. Plaintiff has steadfastly maintained throughout these proceedings that all costs, attorney's fees and damages should be made payable by the Defendant city. It is undisputed that the acts of Sampson and Craig were carried out in their official capacities and that they were vested with sole discretion in determining what type and how much force to apply.

The district court's June 21, 1982 Order specifically found that "[t]here can be no doubt that Craig and Sampson were acting in their official capacities as Atlanta police officers..." The Eleventh Circuit found that the officers were acting in their official capacities and that the killing resulted from the officer's "improper use of his official power." Gilmere I, 774 F.2d at 1501.

Therefore, Plaintiff submits that the issue is controlled by the Supreme Court's decision in Brandon v. Holt, 469 U.S. 464, 469 (1985) which held that: "In at least three recent cases arising under Sec. 1983, we have plainly implied that a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents, provided, of course, the public entity receives notice and an

opportunity to respond. We now make that point explicit." (citing Hutto v. Finney, 437 U.S. 678 (1978) where a judgment was ordered to be paid out of state funds.) "Only in an official capacity action is a plaintiff who prevails entitled to look for relief, both on the merits and for fees, to the governmental entity." Kentucky v. Graham, _____ U.S. _____, 105 S. Ct. 3099, 3108 (1985).

Here the Defendant City not only had notice and an opportunity to respond on behalf of its servants sued in their official capacity, but also was an active party to the case on its own behalf. "It is well settled law that a section 1988 attorneys fee award may run against a public treasury for section 1983 violations by public officers acting in their official capacities even though the

public entity is not named as a defendant in the suit." Odum v. Clark, 748 F.2d 1538, 1542 (11th Cir. 1984). See also Gates v. Collier, 616 F.2d 1268 (5th Cir. 1980) and Gary W. v. Louisiana, 622 F.2d 804 (5th Cir.) 1980. The Defendants have refused to accede to the Plaintiff's demands for payment of the judgment, and seek to shield the wages of the Defendants-employees from garnishment under color of state law as recently fashioned by the Georgia Supreme Court. See, City of Atlanta v. Gilmere, 252 Ga. 406 (1984).

CONCLUSION

This case is and has always been about the **DEATH** of Thomas Patillo. Petitioner calls upon this Court to correct a great injustice that has led to an award of $20,000 as the value of the

life of a black man, murdered by the police. If not addressed by the Court, the ruling below will leave civil rights litigants with a tenuous remedy in civil rights cases, allowing each court to fashion a remedy on a case by case basis. This case is now nine years old and Plaintiff has not collected a penny, but at every step in the proceedings has had the courts frustrate her efforts rather than compensate them. Thomas Patillo was unlawfully killed January 1, 1980; now justice demands that there be adequate compensation that will have the effect of deterring future abuses.

J.M. Raffauf
Attorney for Petitioner
1341 Thomas Road
Decatur, Georgia 30030
(404) 288-0289

CERTIFICATE OF SERVICE

I hereby certify that I have served this petition upon the Defendants by mailing three copies copies to:

Mary Carole Cooney, Esq.
City of Atlanta Law Department
1100 Omni South
Atlanta, Georgia 30335

This the ____ day of June, 1989.

_____
J.M. Raffauf

APPENDIX

APPENDIX I

Opinions, United States District Court, Northern District of Georgia, dated June 21, 1982 and August 9, 1982. 1a

APPENDIX II

Opinions, United States District Court for the Northern District of Georgia, dated December 24, 1986, judgment entered July 14, 1987, amended August 27, 1987. 90a

Appendix III

Opinion, Eleventh Circuit Court of Appeals denying rehearing and rehearing in banc, entered March 6, 1989. 106a

Appendix IV

Opinion, Gilmere v. City of Atlanta, 864 F.2d 734 (11th Cir. 1989) 108a

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EMMA F. GILMERE,

Plaintiff,

v.

CITY OF ATLANTA, et al.,

Defendants.

CIVIL ACTION NO. C80-181

ORDER

On New Year's Day, 1980, Thomas E. Patillo was shot and killed by R. C. Sampson, a police officer employed by the City of Atlanta. Plaintiff Gilmere, Patillo's sister and the administratrix of his estate, brought this action on behalf of Patillo's estate and "for the benefit of his next of kin," his eight brothers and sisters. Defendants are the City of Atlanta, individuals who served as its Mayor, Public Safety Director and Chief of

Police on January 1, 1980, and two of its police officers, Sampson and C. C. Craig. This action was brought under 42 U.S.C. §§ 1983 and 1988, for violations of Patillo's civil rights, and also contains pendent state law claims for false imprisonment, false arrest and assault and battery. The case has been tried to the Court without a jury and this Order constitutes the Court's findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52(a).

FINDINGS OF FACT

1. The Death of Thomas Patillo

Thomas Patillo, a black 38 year old male, spent the afternoon of January 1, 1980, visiting various friends and relatives. He did some drinking on these visits. Late in the afternoon, he invited some friends to visit his apartment at 1643 Bankhead Highway in Atlanta. He drove to

his apartment with a friend, James Beebe, and arrived on his block at approximately 5:00 p.m.

Before entering his driveway, Patillo stopped at a filling station across the street from his apartment. After purchasing gasoline, Patillo pulled out from the station into the street. As he did so, a red van swerved around his car. After the van had passed, Patillo drove his car across the street and into his own driveway. As he and Beebe were standing near the car, the red van returned. Its driver and Patillo exchanged words. The van drove away and Patillo and Beebe entered Patillo's apartment. Several friends soon joined them there.

The driver of the red van apparently called the police and reported that Patillo had threatened him with a gun. The police dispatcher asked by radio for an available

officer to investigate. The radio call simply said that there was a report of a man with a gun at a certain location. Sampson responded that he would investigate and Craig responded that he would back up Sampson. A later radio call apparently told Sampson to meet the driver of a red van at an intersection near Patillo's apartment. Sampson is black, while Craig is white; on January 1, 1980, Sampson was 28 years old and Craig was 24.

The driver of the red van told Sampson he had almost collided with a blue car, and after the near-accident the driver of the blue car had threatened him with a gun pulled from his trunk. The driver of the blue car then returned the gun to his trunk, Sampson was told. Sampson asked where the other driver was, and the complainant pointed out Patillo's car and apartment. Craig arrived, and Sampson told

him that they were going to investigate the owner of the blue car.

Sampson, Craig and the driver of the red van stepped up on the porch of Patillo's apartment. Both officers had left their nightsticks in their patrol cars. A visiting friend answered Sampson's knock, and Sampson asked for the driver of the blue car. Patillo was called in from another room. When Patillo came to the door, the driver of the van identified him by saying, "That's him. He's the one." The driver of the red van disappeared in the ensuing confusion and was never located by the police.

When asked by Sampson, Patillo stated that he owned the blue car and asked what the officers wanted. Sampson said that they wanted to talk to him and Patillo invited them in. There were several people in Patillo's living room, however, and

Sampson asked Patillo to step out on to the porch. Patillo did so and the officers noted from his breath and his gait that he had been drinking. George Burden, a visiting friend, followed Patillo on to the porch and asked the officers, "What are you going to do with him?" Sampson then decided to question Patillo away from the house, told Burden the officers were conducting an investigation and needed to question Patillo, and asked Patillo to come with them. The officers did not tell Patillo or Burden the nature of the investigation. They did not frisk Patillo, or tell him he was under arrest.

Both Craig and Sampson testified, and the Court finds, that the officers did not intend to arrest Patillo. They were conducting an investigation, and merely intended to question him. Their intentions

did not change throughout their encounter with Patillo.

As the trio left the porch, Sampson grabbed Patillo to steady him. Upon reaching the sidewalk, Patillo told Sampson he could walk, and Sampson let him go. Patillo then made an attempt to run, taking a few quick steps and staggering backward. Sampson caught him easily and grabbed the back of his belt to hold him. Craig, a few steps behind, caught up and grabbed Patillo's arm. Patillo began jerking his arms; the officers began trying to control him by holding on to his arms. This was not too difficult, however, as Patillo was fairly drunk.

Next door to Patillo's apartment was a commercial building then being used as an ice cream parlor. The ice cream parlor, which was located at the corner of Bankhead Highway and Florence Street, had a small

parking lot along its Florence Street side. Several cars, including Craig's patrol car, were parked in this lot. These cars were parked parallel to Bankhead, with their front ends pulled up to the side of the ice cream parlor; Craig's patrol car was the third car from Bankhead. Craig and Sampson guided Patillo down Bankhead past the ice cream parlor and turned him in to the parking lot. Burden and his son Donald followed them, with the elder Burden yelling at the officers to let Patillo alone.

Several persons watched Patillo and the officers as they walked down Bankhead and into the parking lot. These people included George Burden and his son Donald, who had followed Patillo from the apartment, Patty and Cheryl Burkes, sisters who had stopped at the gas station across the street, and Robert Horton and Marvin Lumpkin, the employees on duty at the gas

station. Horton and Lumpkin were acquainted with Patillo, who also was employed at the filling station as a tow truck operator and tire repairman. All of these witnesses testified that Patillo and the officers were struggling. Donald Burden further testified that Craig was beating Patillo about the head as they walked, and Patillo was merely trying to defend himself. Pattie Burkes testified that as the trio left the sidewalk, she saw the officers' hands up in the air, coming down on Patillo as if they were beating him. The officers denied having struck Patillo. The Court, relying in particular on Pattie Burkes' testimony, finds that the officers did strike Patillo a number of times as the group walked across the parking lot. Since there was no testimony explaining or justifying these actions, the Court concludes the officers' actions were unprovoked by

Patillo, and were unnecessary to control him.

The trio proceeded into the parking lot and past the rear of the two cars parked between Craig's patrol car and Bankhead. Patillo was not a large man; the Medical Examiner's Report listed his height as 5'9" and his weight as 130 lbs. See Ex. P-21 at 2. Sampson is approximately the same height and weighs about 150 lbs. Craig is slightly shorter, but on January 1, 1980 he weighed about 250 lbs. The level of alcohol in Patillo's bloodstream was later found to be .27 g.%. See Georgia Bureau of Investigation Crime Lab Report, Ex. P-25. This level is considerably above the .10 level which creates a presumption of intoxication under Georgia law, see Ga. Code Ann. § 68A-902.1(b)(3), and Patillo's intoxication was confirmed by his staggering on his porch and later on the sidewalk

as he tried to escape. Despite Patillo's intoxication and the considerable weight advantage of the officers, Patillo somehow broke free or was released as the trio approached the patrol car. At this point, the trio had just passed the rear of a Camaro, the second of the two cars separating Craig's patrol car from the Bankhead sidewalk, and they were turning into the area between the Camaro and the patrol car. The fatal struggle that ensued occurred between these two cars, which were parked side-by-side, in the space between the right rear tire and trunk panel of the patrol car and the left rear tire and trunk panel of the Camaro. See Ex. P-5, a photograph of this scene.

Craig testified that as Patillo broke free, he grabbed the collar of Craig's jacket and pulled it up over his head, temporarily blinding and immobilizing

Craig. When Craig pulled the jacket the rest of the way off, he found himself next to Patillo facing the side of the patrol car. He testified that Patillo then put his hand on Craig's gun in its holster. Craig put his right hand on top of Patillo's in an attempt to immobilize it. According to Craig and Sampson, Sampson then added his hand to the stack, and Craig tried to do the same with his left hand. The officers testified that Patillo managed to jerk the gun free. Craig said he then pushed Patillo's hand straight up, causing Patillo to fall back against the trunk of the patrol car, while Craig dove for cover and shouted, "He's got my gun." Sampson testified that Patillo began to lower the gun from its position over his head, and to level it at Sampson. Sampson then drew his own revolver and fired twice at Patillo as

Sampson fell away out of the line of Patillo's weapon.

Most of the witnesses were located at some distance from the trio; during most of these events, the Burkes sisters, Lumpkin and Horton were across Bankhead, while the Burdens were on the Bankhead sidewalk at the edge of the parking lot. Furthermore, these events occurred during the twilight hours. None of the witnesses could be certain that Patillo broke away from the officers; some suggested that he was released. None of the witnesses recalled seeing Patillo pull Craig's jacket over his head. Lumpkin testified that Craig pushed Patillo away, and George Burden testified that Craig struck Patillo and sent him staggering in the direction of Sampson. None of the witnesses saw Patillo reach for Craig's revolver, and none of them saw a gun in Patillo's hand at any time.

After considering this conflicting testimony, the Court concludes that the officers were striking Patillo as he tried to break away. When he did break away, he reached for Craig's revolver. In the ensuing scuffle, the revolver was knocked to the ground. At that point, Patillo lunged towards Sampson, who reacted by drawing his own revolver and shooting Patillo twice at close range in the abdomen.

The Court has noted Sampson's testimony to the effect that Patillo took Craig's revolver, raised it in the air and was lowering it toward Sampson when Sampson fired his own revolver. The Court does not accept this testimony, which is inconsistent with that of numerous other witnesses.

After Patillo was shot he collapsed face forward onto the parking lot. Donald

Burden testified that Craig drew his revolver, momentarily pressed it into Patillo's hand, then reclaimed it, and began waving it at the gathering crowd. Craig testified that he took Patillo's pulse, picked up his revolver from where it had fallen and holstered it while Sampson called for an ambulance on Craig's patrol car radio. The Court accepts Craig's testimony that he was merely checking Patillo's pulse.

A large crowd of onlookers and friends of Patillo gathered, and some, especially George Burden, were not friendly. The officers ordered the crowd away from the scene, and refused to let anyone touch Patillo. At one point, one or both officers drew a gun and ordered the crowd to stay back. Neither Sampson nor Craig turned Patillo over to examine his wounds, despite the fact that Craig had found a

slight pulse when he checked immediately after the shooting. Eventually additional police arrived, as did the ambulance. Patillo was taken to Grady Memorial Hospital, where he was pronounced dead 30 minutes after he arrived.

Detective W. D. Swinney of the Department's Homicide Division arrived at the scene at 6:15 p.m. Swinney was involved in a serious automobile accident on the eve of trial in this case and did not testify; however, his deposition and his report are in the record.

The body of Patillo was removed before Swinney's arrival. When Swinney arrived, he spoke with Sampson and Craig first. Because of the presence of a hostile crowd, he instructed them to go to the Homicide Office and wait for him there, Ex. P-1 at 14; Swinney took statements from the officers late that night. At the scene,

Swinney and another detective then located eight witnesses. All or most of these witnesses were taken to the police station, where their statements were recorded. These witnesses included four of the eye-witnesses who testified at trial (the Burdens and the Burkes sisters), but did not include two others (Lumpkin and Horton). Five of the eight witnesses (Beebe, both Burdens, Cheryl Burkes and James Bailey) stated that the officers had beaten Patillo without provocation while walking him to Craig's patrol car. None stated they had seen a gun in Patillo's hand.

The Georgia Bureau of Investigation Crime Lab Report indicated that Sampson's gun was in contact with Patillo's clothing when one of the two shots was fired. Ex. P-25 at 2. The gun was in "near contact" at the time of the other shot. Id.

Examination of Craig's weapon revealed fingerprints. These fingerprints did not match Patillo's. See Ex. P-1 at 18. Examination of Patillo's hands revealed the presence of barium and lead, two components of gunshot residue. See Ex. P-21. Richard Earnest, a Firearms Examiner with the Georgia State Crime Lab, testified that this residue could have resulted from the holding of a gun or from the hands being near a gun when it was fired. Craig's revolver was never fired during the struggle, and there is no evidence regarding when it was last fired. Donald Burden testified that Patillo had fired a pistol on New Year's Eve, the night before his death.

Swinney's report for the Homicide Division was passed on to the Internal Affairs Division, which reviewed it and exonerated Craig and Sampson. The Firearms

Review Board later reviewed the incident and found no misconduct or violation of departmental rules. See Ex. P-41 at 3. Nor did the Fulton County Grand Jury recommend any action against Sampson and Craig. There was also some evidence that the Federal Bureau of Investigation inquired into the incident and cleared the officers.

At the time of his death, Patillo was 38 years old, see Ex. P-46, and had a life expectancy of 33.97 years according to the Commissioners 1958 Standard Ordinary Mortality Table, Ex. P-45. According to his employer, Roger Boyd, Patillo was earning $125.00 per week at the time of his death, and was scheduled to receive substantial raise as of January 1, 1980. His funeral cost $4,095.53; social security paid $255.00, while his brothers and sisters paid the remaining $3,840.53. See Ex. P-6. His siblings also purchased his

gravestone, at a cost of $575.00. See Ex. P-7.

2. Selection, Training and Supervision of Craig and Sampson

Sampson joined the Atlanta Police Department in 1973. A background investigation at that time revealed that he had no criminal record, but had incurred ten traffic tickets for moving violations between December 1969 and June 1972; these violations had at one time resulted in the suspension of his driver's license. See Ex. P-33. It was not the practice of the Atlanta Police Department in 1973 to administer psychological tests to its applicants, and Sampson received no such testing.

Sampson received the standard 1973 police academy training course, which he recalled as being one week on the pistol range and five weeks in the classroom.

This recollection appears to be substantially correct; see Ex. P-14, a copy of the 1970 police academy curriculum. In his testimony, Sampson had some difficulty recalling the substance of this training course.

Between 1973 and March 1978, citizens filed at least two complaints against Sampson alleging misconduct. See Ex. P-33, P-34. One of these complaints involved use of excessive force. See Ex. P-34. These complaints were investigated by the Department and Sampson was exonerated in each case. The Firearms Review Board also investigated an incident in which Sampson discharged his weapon, and the Auto Safety Committee investigated three automobile accidents involving Sampson. Again, he was cleared on each occasion. See Ex. P-31 at 2.

There are two performance evaluations regarding Sampson in the record. One covers November 1976 through March 1977, and rates Sampson as average in all eight categories. The supervisor suggested that Sampson could improve in the "public relations" area "by curbing temper...and maturing." Ex. P-36 at 2. As to "judgment," the report noted a need for improvement of Sampson's "judgment in tight situations." Id. at 4. The second evaluation, which covers April 1, 1977 to September 30, 1977, rated Sampson above average in six categories and excellent in two others, and contained no suggestions regarding the need for improvement. See Ex. P-35.

Sampson resigned from the Department in March 1978. He was an officer in good standing at that time. Despite his resignation, the Department "suspended" him in November 1978 for marijuana use while he

was a police officer. See Ex. P-31 at 1, 3. In late 1978, Sampson applied for reinstatement to the Department. Apparently because of his "suspension" he was required to take a polygraph test regarding his use of drugs. He failed the test, but insisted on a retest by another polygraph examiner. He passed the second test and was reinstated. Sampson was not given any psychological testing at his reinstatement, and received only one day of reorientation.

Some time after Patillo's death, Sampson was involved in another physical altercation with an older citizen resulting from Sampson's investigation of an illegal trash fire. The ensuing struggle resulted in the citizen's long-term hospitalization for a stroke or heart attack.

At some time after Sampson's hiring, the Department began administering psychological tests to its applicants before it

decided to hire them. When Craig was hired in 1978, he underwent such testing. Craig went through the 1978 version of the police academy's training program, which he recalled as being 13 weeks long. On cross-examination, Craig described two incidents in which he had shot at persons fleeing from police, one in August 1979 and one in March 1980; Plaintiff presented no evidence that suggests that Craig was not exonerated by the investigation conducted by the Firearms Review Board in each instance.

Georgia law currently requires all police departments to give 240 hours (or six 40-hour weeks) of training to their recruits. The required curriculum is set forth in Ex. P-17. The Atlanta Police Department provides 480 hours of classroom training, and did so at the time Craig was hired. This training occurs at the police

academy which employs ten full-time and 25-30 part-time instructors. A recent academy curriculum is set forth in Ex. City-5. In addition, according to Major Richard Davis, who ran the Department's training program at the time of trial, the Department provides further on-the-job training by pairing all recruits with experienced officers during their first eight weeks on the job; the experienced officer evaluates and reports on the rookie on a daily basis. This on-the-job training was instituted after Sampson's days as a recruit but before Craig's. After this field training, the officer is on probationary status for six months, and his supervisor files a monthly report on him.

Davis testified that the recruits now receive five or six hours of training regarding when to use deadly force. One instructor's "Firearms" course curriculum

lists the "legal and moral limitations governing the use of a firearm" as within the scope of his course; this instructor then devotes one page of his 18-page course to this subject, or approximately the same amount of space devoted to the procedure for cleaning the weapon. Compare Ex. P-19 at 304 with id. at 13-14. Part of this five or six hours of training is the reviewing of several films that present certain situations to the recruit and require him to decide whether to shoot; the Court viewed one of these films in the course of this trial.

Instruction in the use of non-deadly force is given as part of the physical training and the course in the mechanics of arrest. These combined subjects presently consume about 40 hours of instruction time. One instructor's curriculum involves the showing of a film entitled "Defensive

Tactics II-the Police Baton," and this instructor specifically instructs the recruits always to wear their nightsticks. See Ex. City-8 at 15.

Davis changes the academy curriculum as a result of changes in the law, feedback from internal investigations of the Firearms and Accident Review Boards, and changes in departmental policy. The current curriculum described above appears to have changed relatively little since Craig went through the academy. It has changed considerably since Sampson's academy days, and there was little evidence regarding the content of the curriculum in 1973.

After an officer leaves the academy he is required to return only once a year, for one day. He spends about five hours of that day on the pistol range, requalifying with his weapon. The remaining time is

spent in the classroom, being instructed in a selected area. Recent subjects taught in these three or four hours per year include physical fitness, response to hostage situations, and the "LAM" method of controlling a prisoner with the nightstick. Other continuing education courses are offered to police officers on a voluntary basis. Apparently neither Sampson nor Craig had ever taken any voluntary continuing education or retraining.

Each Atlanta police officer is given a loose-leaf binder entitled "Standard Operating Procedures," which contains the rule, regulations and policies of the Department. See Ex. P-10. This book is updated regularly and the updates are distributed to each officer. In addition, changes in departmental policy or in the law are sometimes covered in roll calls at the start of an officer's shift.

The present rule regarding the nightstick states that it "will be worn," and that "personnel may be exempt from wearing the Baton and Holder upon approval of their Division Commander." Id. § 4.07 at 54. Earlier versions of this rule apparently gave superior officers complete discretion as to whether the officers under their command were required to wear the nightstick. Craig testified that he was under the impression that the only time he was required to wear his nightstick was at roll call.

CONCLUSIONS OF LAW

1. Liability Under 42 U.S.C. § 1983

A. Officers Sampson and Craig

A cause of action under 42 U.S.C. § 1983 has two essential elements: conduct under color of state law, and a resulting deprivation of rights, privileges or immun-

ities secured by federal law. Parratt v. Taylor, 451 U.S. 527, 535 (1981). There can be no doubt that Craig and Sampson were acting in their official capacities as Atlanta police officers at the time of their encounter with Patillo; thus they were acting "under color of state law."

Plaintiff suggests that Craig and Sampson deprived Patillo of several rights guaranteed by the federal Constitution. Among these rights are Patillo's right to be free of unreasonable seizures and the right not to be deprived of life or liberty without due process of law.

There is much precedent for the general proposition that the use of excessive force by law enforcement officers can give rise to section 1983 liability. See, e.g., Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981); Owens v. Haas, 601 F.2d 1242 (2d Cir.), cert. denied sub nom.

County of Nassau v. Owens, 444 U.S. 980 (1979); Palmer v. Hall, 517 F.2d 705 (5th Cir. 1975); Knight v. Carlson, 478 F.Supp. 55 (E.D. Cal. 1979); Leite v. City of Providence, 463 F.Supp. 585 (D.R.I. 1978). However, not all killings by police officers are wrongful; officers are empowered by law to use force, even deadly force, in certain situations. Even if Sampson's killing of Patillo was wrongful, Plaintiff has yet another hurdle to surmount, because not all wrongful acts of state employees rise to the level of violations of section 1983. See Estelle v. Gamble, 429 U.S. 97, 106 (1977); Paul v. Davis, 424 U.S. 693, 698-99 (1976). The issue facing the Court is whether the force employed by the officers was so excessive as to give rise to a section 1983 cause of action.

In this Circuit, a court must consider several factors in deciding whether the force is so excessive as to create section 1983 liability. The Court must balance the need for the application of force, the need for the degree of force applied, the extent of the injuries caused, and whether the force was applied in a good faith effort to control the victim or maliciously and sadistically for the purpose of causing injury. Williams v. Kelley, 624 F.2d 695, 697 (5th Cir. 1980), cert. denied, 451 U.S. 1019 (1981), quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), cert. denied sub nom. John v. Johnson, 414 U.S. 1033 (1973).

Plaintiff suggests that the officers used excessive force on two separate occasions during their encounter with Patillo. First, they unnecessarily struck him while walking him across the parking lot. Second, Sampson unnecessarily shot and

killed him in the parking lot. The Court will consider each of these uses of force in turn.

Patillo did attempt to flee, and was struggling as the officers escorted him from his apartment to Craig's patrol car. Thus the officers needed to apply some force to control him. The Court has found, however, that both officers were not merely holding on to Patillo's struggling arms, as they testified, but were striking Patillo with little or no provocation by the time they reached the back of the patrol car. Thus, they applied more force than was necessary to control Patillo. The Court also concludes that these blows were not delivered in a good faith effort to control Patillo, but rather out of irritation at his initial resistance to their efforts to question him. After balancing the Williams factors, the Court concludes that Sampson

and Craig employed force so excessive as to give rise to section 1983 liability while escorting Patillo toward Craig's patrol car.

With regard to Sampson's shooting of Patillo, the second and third factors of the Williams test support Plaintiff's arguments, and they weigh quite heavily in her favor. The injury to Patillo, of course, was the ultimate possible injury. The degree of force applied, furthermore, far exceeded the force required under the circumstances. Two officers were dealing with one smaller, intoxicated individual. Any fears that Patillo was armed were unreasonable because the complainant's statement that Patillo had returned his gun to his trunk, and were caused by the officer's own failure to frisk Patillo. The officers had successfully maneuvered a struggling Patillo down the street and

across the parking lot, and they were on the verge of placing him into a patrol car. Under these circumstances, non-deadly force should have been sufficient to control Patillo. The officers, of course, had deprived themselves of one effective option by leaving their nightsticks in their patrol cars. However, this negligence cannot excuse their use of excessive force. After balancing the Williams factors, the Court again concludes that the force employed, this time by Sampson alone, was so excessive as to create section 1983 liability.

The officers have raised the defense of good faith immunity. A state official is protected from liability for acts he performs in good faith in the pursuit of his duties. Wood v. Strickland, 420 U.S. 308 (1975); Scheurer v. Rhodes, 416 U.S. 232, 240 (1974). This qualified immunity

is available to police officers. Pierson v. Ray, 386 U.S. 547, 555 (1967); Barker v. Norman, 651 F.2d 1107, 1120 (5th Cir. 1981). The officers have the burden of pleading this defense, Gomez v. Toledo, 446 U.S. 635 (1980), and the Court finds that the substance of this defense was raised in their Answer. See Answer at Fourth Defense. There is no doubt that the officers were acting in their official capacities at the time of their encounter with Patillo. Furthermore, the Court concludes that the actions they took were within their discretionary authority as police officers. Plaintiff can still prevail, however, by establishing that the officers were not acting in good faith during their encounter with Patillo. Barker, 651 F.2d at 1121; Cruz v. Beto, 603 F.2d 1178, 1182-83 (5th Cir. 1979).

"Good faith" has an objective and a subjective component. Wood, 420 U.S. at 321; Barker, 651 F.2d at 1121. If the officers lacked either subjective or objective good faith, they cannot raise the defense of immunity. Wood, 420 U.S. at 321. The objective component concerns the reasonableness of their actions in light of clearly established law at the time of the events at issue. The objective component concerns the presence or absence of malicious intent on their part. Id. Plaintiff has suggested that both components of good faith are lacking here.

With regard to the officers' striking of Patillo as they walked him to the car, the Court agrees. A violation of clearly established state law would deprive Sampson and Craig of the objective component of the good faith immunity defense. Williams v. Treen, 671 F.2d 892 (5th Cir. 1982). Under

Georgia law, police officers are immune from criminal prosecution for actions taken in making a lawful arrest only if those actions are "reasonable." Ga. Code Ann. § 26-901(d). There is no "reasonable" explanation of the actions of the officers. The Court has already found that the officers did not need to strike Patillo as they walked him toward the police car. He was, after all, a smaller, intoxicated older man, and they had a considerable weight advantage over him. They had been able to control him on the sidewalk simply by holding on to his arms. Their unprovoked striking of Patillo as they walked across the parking lot was not reasonably necessary to control him, and thus was not sufficient to insulate the officers from criminal liability under clearly established Georgia law. Certainly it cannot insulate them from civil liability, either.

Furthermore, even if the actions of the officers were objectively reasonable, the Court finds that Sampson and Craig lacked subjective good faith at this point in their encounter with Patillo. The Court bases this conclusion on the lack of independent evidence that this beating was provoked by Patillo and on its observation of the officers as they testified. Because they lacked both subjective and objective good faith, Craig and Sampson cannot assert the good faith immunity defense regarding their actions in striking Patillo.

The Court next turns to Sampson's assertion of good faith in his shooting of Patillo. When Sampson shot Patillo, he was attempting to protect himself as well as to question his victim. The Court accepts Sampson's testimony that he felt himself to be in some danger. Consequently, the Court cannot find that Sampson was not acting in

subjective good faith when he shot Patillo. However, Plaintiff further suggests that Sampson's actions in shooting Patillo were not objectively reasonable in light of the clearly established law of Georgia.

Under Georgia law, the use of deadly force is justified only if a person "reasonably believes that such force is necessary to prevent death or great bodily injury to himself or a third person, or the commission of a forcible felony." Ga. Code Ann. § 26-902(a). Plaintiff contends that even if Sampson subjectively believed his life to be in danger when he shot Patillo, this belief was not "reasonable," and hence his shooting of Patillo was not justified by existing law. This is a close question. It is true that at the moment Sampson shot him, Patillo was free and moving toward Sampson. Although the officers had not frisked him, Sampson had been told by the

complainant that Patillo had returned his weapon to his trunk; thus, Sampson had no reason to think that Patillo was armed. Two younger, larger officers trained in the use of non-deadly force had other options at this point. With some hesitation, the Court concludes that Sampson's belief that his life was in danger was not "reasonable." Consequently, he was not acting in objective good faith when he shot and killed Patillo. Sampson therefore is not protected from section 1983 liability for Patillo's death by the qualified immunity defense.

B. Supervisor Defendants

Three of the remaining Defendants were high-level city or police officials on January 1, 1980. Jackson was Atlanta's Mayor, Brown was its Public Safety Commissioner, and Napper was its Chief of Police.

Plaintiff alleges that these Defendants, too, are liable under section 1983.

To establish the section 1983 liability of supervisors, Plaintiff must prove an "affirmative link" between Patillo's death and "the adoption of any plan or policy by [the supervisors]--express or otherwise--showing their authorization or approval of such misconduct." Rizzo v. Goode, 423 U.S. 362, 371 (1976). Plaintiff tempted to do so by attacking the Atlanta Police Department's procedures for selecting and training candidates for the force, the Department's failure to issue regulations clearly requiring its officers to carry nightsticks at all times, and its inadequate procedures for responding to calls for police assistance.

Plaintiff concedes that she named Jackson as a Defendant merely because he appointed Brown and Napper. Plaintiff's

Proposed Findings of Fact and Conclusions of Law at 9. Plaintiff presented no evidence regarding any further connection of Jackson to the events at issue here. The Court finds as a matter of law that Jackson is not liable under section 1983. Cf. Monell v. Department of Social Service, 436 U.S. 658 (1978) (liability of a government entity cannot be based solely on respondeat superior theory).

Napper and Brown are Defendants because they are responsible for hiring and training Craig and Sampson. Plaintiff's Proposed Findings of Fact and Conclusions of Law at 9. Plaintiff presented no evidence of any direct participation by Brown and Napper in the shooting of Patillo. Cf. Baskin v. Parker, 602 F.2d 1205, 1208 (5th Cir. 1979) (although sheriff cannot be held liable under section 1983 theory of respondeat superior, he

might be liable for personal participation in actions of his deputies that violated plaintiff's constitutional rights). Although Brown and Napper do have the right to control the actions of Craig and Sampson, supervisors cannot be held liable under section 1983 for "mere right to control without any control or direction being exercised." Monell, 436 U.S. at 694 n.58, citing Rizzo, 423 U.S. at 370-71. The "affirmative link" between Patillo's death and the actions of Brown and Napper must therefore concern their failure to implement an adequate training program. However, Plaintiff presented no evidence that Brown and Napper had any connection with the selection and training of Atlanta police officers, other than their "mere right to control" such activities. In the absence of a more direct "affirmative link" between the death of Patillo and any

actions or inactions taken by Brown and Napper, the Court concludes that these Defendants, too, cannot be held liable under section 1983.

C. Municipal Liability

Plaintiff also asserts that the City of Atlanta is liable under section 1983 for Patillo's death. Theoretically, it is possible for the City to be held liable under section 1983 despite the fact that the individual supervisory defendants have escaped liability. The fact that Plaintiff has failed to establish an "affirmative link" between Patillo's death and the actions of the supervisors she chose to name as Defendants could merely indicate that Plaintiff named the wrong supervisors as Defendants. It does not necessarily follow that no police supervisor could be held liable under section 1983; if other known supervisors improperly selected and

trained Sampson and Craig, the City might still be held liable for their actions.

The starting point for an analysis of municipal liability under section 1983 is the Supreme Court's decision in Monell v. Department of Social Services, 436 U.S. 658 (1978). In Monell, the Supreme Court held for the first time that municipalities were "persons" within the meaning of section 1983, and thus could be held liable under that statute. Id. at 690. However, the Court went on to hold that a municipality could not be held liable for all torts committed by its employees, but only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." Id. at 694.

Plaintiff here asserts that two City "policies or customs" resulted in Patillo's

death. Plaintiff asserts that it was the policy or custom of the Atlanta Police Department to inadequately select and train its officers and to fail to clearly require them to carry their nightsticks at all times. Plaintiff also asserts that it was the policy or custom of Atlanta police officers to use excessive force in their contacts with Atlanta citizens. The Court will consider these claims in reverse order.

It is possible to establish section 1983 liability against a municipality for police misconduct by proving that police regularly engage in a certain form of misconduct and that their supervisors do nothing about it. To make out such a case, however, plaintiffs generally present evidence of several similar incidents and a subsequent failure to discipline. See, e.g., Ellis v. City of Chicago, 478 F.Supp.

333 (N.D. Ill. 1979) (four incidents of police misconduct warrant denial of city's motion to dismiss); Knight v. Carlson, 478 F.Supp. 55, 59 (E.D. Cal. 1979) (municipal liability could be established by proof that use of excessive force by police is "the deeply imbedded traditional way of carrying out county policy" or "the regular and repeated response to a situation"). Cf. Turpin v. Mailet, 619 F.2d 196, 202 (2d Cir.), cert. denied sub nom. Turpin v. City of West Haven, 449 U.S. 1916 (1980) (a single failure to discipline a police officer for an unlawful arrest is insufficient to establish municipal "custom or policy"). Plaintiff here presented very little evidence of other incidents in which Atlanta police officers used excessive force. Plaintiff merely cross-examined Sampson with respect to one incident that occurred after Patillo's death, and intro-

duced reports indicating that citizens had complained of his conduct on two other occasions but he had been cleared. It is true that one court has held that allegations regarding a single incident of misconduct can sufficiently suggest that such misconduct is the policy or custom of a police force, at least so as to survive a motion to dismiss. Owens v. Haas, 601 F.2d 1242 (2d Cir.), cert. denied sub nom. County of Nassau v. Owens, 444 U.S. 980 (1980). However, Owens involved a particularly brutal, premeditated beating, and the active participation of relatively senior officials; neither factor is present in this case. The Court concludes that Plaintiff has failed to present sufficient proof that it was the policy or custom of Atlanta police officers to use excessive force; therefore, the City cannot be held liable on this theory.

Plaintiff's second theory of municipal liability concerns the alleged failure of the Atlanta Police Department to adequately select and train its officers, and its alleged failure to clearly require officers to carry their nightsticks at all times. Plaintiff alleges a wide range of inadequacies in these areas, but the Court needs to consider only one. Sampson was a police officer for less than five years before his resignation in 1978. After almost a year away from the Department, Sampson sought to return. The Department had indications that he might not be a model officer; in fact, the Department had "suspended" him during his absence for drug use while he was an officer. Despite these indications, and despite the fact that Sampson failed his first polygraph test concerning his drug use, the Department did not give Sampson any psychological testing when he

sought to return, even though new recruits such as Craig were receiving such testing during this period. Despite the length of his absence from the police force and his relative inexperience at the time he left, Sampson's retraining was accomplished in only one day, a day of "reorientation," according to Sampson. This failure to adequately test Sampson and to adequately prepare him for his return to duty constitutes negligence, at the very least.

Nor is there any doubt in the Court's mind that the City's failure to retrain Sampson played a role in the death of Patillo. Sampson testified that he did not recall the substance of his academy training regarding investigatory stops and regarding when to carry and use his nightstick. He testified that he did not recall ever being taught <u>any</u> method of dealing with a suspect armed with a gun that did

not involve the use of his own weapon. Sampson could not intelligently discuss the legal requirements or the preferred methods of making an arrest, and was not quite sure when, if ever, he and Craig had placed Patillo "under arrest." These lapses of memory or knowledge on the part of Sampson, while regrettable and in this case disastrous, are understandable in the light of the Department's negligent omission of any serious attempt to retrain him upon his return to the Department--or at any other time. This negligence contributed directly to his shooting of Patillo.

It did not contribute, however, to the unprovoked striking of Patillo by the officers. That constitutional violation involved Craig as well as Sampson, and resulted more from the officers' emotional reaction to Patillo's attempted flight than from any lack of training. It is possible

that psychological testing upon Sampson's rejoining the force might have prevented that constitutional violation as well, but the Court is not prepared to so find on the evidence before it. The City's liability, if any, is limited to damages resulting from Sampson's violation of Patillo's rights in shooting him.

The City cannot be held liable in a section 1983 action for mere negligence, however. The leading case in this area is Leite v. City of Providence, 463 F.Supp. 585 (D.R.I. 1978). Leite held that municipal liability for inadequate training or supervision of its police force could be predicated only on a showing that the training was so inadequate that it amounted to "deliberate indifference" on the part of the municipality to the resulting violations of constitutional rights of its citizens. Id. at 590. The Leite court

went on to say that training in a "reckless or grossly negligent manner so that future police misconduct is almost inevitable" would indicate the required "deliberate indifference." Id. Building on Leite, another district court has required proof that the municipality "completely failed to train" its officers or trained them with "reckless disregard of the need to inform and instruct police officers to perform their duties in conformance with the constitution." Edmonds v. Dillin, 485 F.Supp. 722, 727 (N.D. Ohio 1980). See also Owens v. Haas, 601 F.2d 1242, 1246 (2d Cir.), cert. denied sub nom. County of Nassau v. Owens, 444 U.S. 980 (1979); Spriggs v. City of Chicago, 523 F.Supp. 138, 142 (N.D. Ill. 1981); Popow v. City of Margate, 476 F.Supp. 1237, 1247 (D.N.J. 1979).

Atlanta has not "completely failed to train" its officers; for all practical purposes, however, it certainly failed to retrain Sampson upon his return to the Department. Combined with the Department's failure to administer any psychological tests to Sampson upon his return to duty, its failure to retrain him constitutes gross negligence. It should have been obvious that Sampson's return to duty without any serious retraining might result in violations of the constitutional rights of Atlanta's citizens. The Department's conduct amounts to a deliberate indifference to those constitutional violations. Thus, the City of Atlanta is liable for Sampson's shooting of Patillo.

2. Damages for Violations of Section 1983

One of the purposes of section 1983 is to provide compensation to citizens wronged

by the deprivation of their constitutional rights. Carey v. Piphus, 435 U.S. 247, 254 (1978). A plaintiff is entitled to recover for the deprivation of the right itself, and for other injuries that are the natural consequence of the deprivation. See Whirl v. Kern, 407 F.2d 781, 797 (5th Cir.), cert. denied, 396 U.S. 901 (1969).

Thomas Patillo did not bring this lawsuit, of course; Plaintiff here is the administratrix of his estate, and a representative of his next of kin, his brothers and sisters. A question arises, therefore, as to whether either Patillo's estate or his next of kin are entitled to compensation in a section 1983 lawsuit for the injury suffered by Patillo. On its face, section 1983 does not answer this question. Because section 1983 is "deficient" in this respect, 42 U.S.C. § 1988 requires the Court to apply "the common law, as modified

and changed by the constitution and statutes of the [forum] State...so far as the same is not inconsistent with the Constitution and laws of the United States." The Supreme Court has read section 1988 to require the adoption of state law as "the principal reference point in determining survival of civil rights actions." Robertson v. Wegmann, 436 U.S. 584, 589-90 (1978). The Court must apply state law, in fact, unless it is inconsistent with the policies underlying section 1983. Id. The Supreme Court has also suggested that state tort law is useful in determining section 1983 damages. Carey, 435 U.S. at 257-58.

Under Georgia law, a tort claim is not extinguished by the the death of the injured party, but survives to his personal representative, in this case his administratrix. Ga. Code Ann. § 3-505. Georgia

law further provides for a cause of action for "the homicide of the husband or parent"; such an action may be brought only by "a widow, or, if no widow, a child or children" of the deceased individual. Ga. Code Ann. § 105-1302. Federal courts, following the suggestions set forth in Robertson and Carey regarding the utilization of state law, have used these statutes in determining the survival of and the proper plaintiff in section 1983 suits arising from killings by police officers in Georgia. See Brazier v. Cherry, 293 F.2d 401 (5th Cir.), cert. denied, 368 U.S. 921 (1961); Anderson v. Jones, 508 F.Supp. 399 (N.D. Ga. 1980).

In Anderson, Judge Vining reasoned that section 3-505 applies to the survival of the decedent's cause of action for violation of his civil rights, while section 105-1302 creates a wrongful death

cause of action for his surviving spouse and children for their loss as a result of his death. 508 F.Supp. at 400. Under section 3-505, therefore, Patillo's causes of action for the two deprivations of his constitutional rights by Sampson, Craig and the City of Atlanta survive his death, and can be pursued by Plaintiff as his administratrix. If Patillo had been survived by a wife or child, those persons would also be entitled to damages for his wrongful death under section 105-1302, and they could pursue those damages as a remedy in the section 1983 action as well. See Brazier, 293 F.2d at 409. Patillo, however, left neither widow nor child, and his brothers and sisters are not given a wrongful death cause of action by section 105-1302. Therefore, the application of Georgia law, incorporated into section 1988, would appear to limit Plaintiff's recovery here

to damages for violation of Patillo's constitutional rights, to which Patillo's estate is entitled, while foreclosing the collection of damages for his wrongful death, which are not available to his brothers and sisters.

The Court would be permitted to disregard state law, according to section 1988, if it were "inconsistent with the Constitution and laws of the United States." The Supreme Court has provided some guidance in this area in Robertson v. Wegmann, 436 U.S. 584 (1978). Robertson was a section 1983 suit seeking damages for bad faith prosecutions. The plaintiff died before trial, and the defendants moved to dismiss, pointing out that under Louisiana law the analogous tort action would survive only in favor of a spouse, children, parents or siblings; the deceased plaintiff had no such relations. The District Court

denied the motion to dismiss, finding the Louisiana abatement law to be "inconsistent with" federal law within the meaning of section 1988, and creating a federal common law of survival of all section 1983 actions. Id. at 587. The Fifth Circuit agreed, finding the abatement of the remedy to be inconsistent th the broad remedial purposes of section 1983. Id. at 588. The Supreme Court, however, reversed, finding that abatement was not inconsistent with federal law. Id. at 592-93.

The Robertson court carefully limited its holding, id. at 594, and expressly left open the question presented by this case, that is, "whether abatement based on state law could be allowed in a situation in which deprivation of federal rights caused the death." Id. The Robertson reasoning nonetheless can provide a pattern for this Court's analysis of the possible "inconsis-

tency" of Ga. Code Ann. § 105-1302 with federal civil rights law.

The Robertson court began by considering the policies underlying section 1983, the "compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." Id. at 591. The abatement statute did not impair the deterrent function, the Court held, because relatively few plaintiffs would not be survived by a spouse, child, parent or sibling. Id. at 591-92. As for the compensation function, it would not be served by forcing the defendant to pay damages to the decedent's estate. Id. at 592. Therefore the Court held the abatement statute to be not inconsistent with the policies expressed in section 1983.

This analysis mandates the same conclusion with regard to Ga. Code Ann. §

105-1302. It is true that section 105-1302 is more restrictive than the Robertson statute, because it does not provide a cause of action for parents or siblings. Although it is a closer question here, the Court believes that the probability that a state official's victim might have a spouse or child, who could collect damages under section 1983 for a wrongful death, should provide sufficient deterrent to state misconduct that results in the death of citizen. Nor would the compensation function of section 1983 be served by overriding section 105-1302 and permitting Patillo's next of kin to collect the full value of his life; although there was some evidence that Patillo occasionally did handyman work around the homes of some of his siblings, he was not contributing to the support of any of them at the time of his death, and thus they lost nothing,

financially, when he died. The Court concludes that Plaintiff's damages are limited to compensation for the violation of Patillo's constitutional rights, to which Patillo's estate is entitled under section 1983 and Ga. Code Ann. § 3-505.

Plaintiff's proof on the damages issue was sparse, and exclusively directed toward the wrongful death aspect of the section 1983 claim. The proof consisted of evidence regarding Patillo's life expectancy and income, and bills for the expenses of his funeral. These are items of damages that might properly be claimed by a surviving wife or child under Ga. Code Ann. § 105-1302, but they are are not damages for violations to Patillo's constitutional rights and thus cannot be awarded here.

Nonetheless, Sampson, Craig and the City of Atlanta deprived Patillo of his constitutional rights. Violation of those

rights cannot go unpunished by the serendipitous fact that the victim happened to die a bachelor with no children. Certain other harms necessarily accompanied the violation of Patillo's constitutional rights, and his estate is entitled to general damages for those harms. Such harms include any injuries resulting from the officers' unprovoked striking of Patillo, his emotional distress, and the humiliation he suffered during his encounter with the police officers. The Court is aware that Carey v. Piphus, 435 U.S. 247 (1978), forecloses the award of damages for mental and emotional distress caused by the denial of a right to a hearing unless such damages are actually proved. However, the Carey court limited the effect of that opinion to procedural due process claims under section 1983, see id. at 264-65, and refused to disapprove section 1983 awards of damages

"inferred from the circumstances" for other constitutional violations. Id. at 264 n.22, quoting Hostrop v. Board of Junior College District No. 515, 523 F.2d 569, 579 (7th Cir. 1975), cert. denied, 425 U.S. 963 (1976). The Court does not believe that Carey forecloses an award of more than nominal damages for the humiliation and emotional distress caused to Patillo by Sampson, Craig and the City of Atlanta. The Court concludes that $1,000 would be adequate compensation for the deprivation of Patillo's rights by Sampson and Craig when they struck him unnecessarily, and that $20,000 would be adequate compensation for the deprivation of his rights by Sampson and the City of Atlanta when Sampson shot him. The Court awards those sums as general damages to Plaintiff as Patillo's administratrix.

Plaintiff also seeks punitive damages. Such an award is permissible under section 1983. See Carey, 435 U.S. at 257 n.11. An important factor in deciding on whether to award punitive damages, of course, is the nature of the defendant's conduct. See, e.g., Lee v. Southern Home Sites Corp., 429 F.2d 290, 294 (5th Cir. 1970). The Supreme Court has suggested that a trial court's conclusion regarding a defendant's subjective good faith is also relevant to the awarding of punitive damages. Wood, 420 U.S. at 322. In light of the Court's finding that Sampson acted in subjective good faith when he shot Patillo, the Court declines to award punitive damages against him for that violation. Nor can punitive damages be assessed against the City of Atlanta for its violation of Patillo's rights in failing to retrain Sampson

properly. City of Newport v. Facts Concerts, Inc., 453 U.S. 247 (1981).

With regard to the unprovoked striking of Patillo by Sampson and Craig, however, the Court did not find subjective good faith on the part of the officers. It is not uncommon for a court to award punitive damages in a civil rights action arising from the use of excessive force to deter police officers from future abuses of their authority. See, e.g., Stengel v. Belcher, 522 F.2d 438 (6th Cir. 1975), cert. dismissed, 429 U.S. 118 (1976); Palmer v. Hall, 517 F.2d 705 (5th Cir. 1975). The Court believes that punitive damages are justified for the officers' striking of Patillo, and awards $4,000 in punitive damages jointly against Craig and Sampson for this violation.

Plaintiff filed a post-trial motion to amend her Complaint under Fed.R.Civ.P.

15(b) to conform it to the evidence. As amended, the Complaint would seek certain additional equitable relief. Plaintiff would like the Court to order an internal police investigation of the incident and internal disciplining of Sampson and Craig, psychological testing of the officers, the revision of police academy training regarding the use of deadly and non-deadly force, and the implementation of a retraining program. These requests open substantial new questions of law and fact. Furthermore, the evidence before the Court does not provide a sufficient basis to justify the relief sought by Plaintiff. The Court therefore DENIES Plaintiff's post-trial motion to amend.

Finally, Plaintiff seeks attorney's fees pursuant to 42 U.S.C. § 1988. The Court GRANTS this award, and directs Plaintiff to file all affidavits and briefs

regarding the amount of such an award within 30 days of the date of entry of this Order.

3. State Law Claims

Plaintiff also seeks damages for several state law torts, under the Court's pendent jurisdiction. See United Mine Workers v. Gibbs, 383 U.S. 715 (1966). These torts include false arrest, false imprisonment, and assault and battery.

Georgia law creates a cause of action for an arrest "without probable cause, when made maliciously." Ga. Code Ann. § 15-1001. Plaintiff has not established a lack of probable cause. The officers did have probable cause to arrest Patillo, within the meaning of Ga. Code Ann. § 105-1003 ("want of probable cause...shall exist when the circumstances are such as to satisfy a reasonable man that the accuser had no ground for proceeding but his desire to

injure the accused"). The driver of the red van had reported to the officers that a person had threatened him with a gun; such a threat might constitute aggravated assault, a felony under Georgia law. See Ga. Code Ann. § 26-1302. The complainant had subsequently identified Patillo as the man who had threatened him. Patillo then took the first opportunity to attempt to flee. These factors add up to probable cause. The Court finds for all Defendants on the false arrest claim.

False imprisonment, under Georgia law, "consists in the unlawful detention of the person of another." Ga. Code Ann. § 105-901. Because the officers had probable cause under Ga. Code Ann. § 105-1003 to detain Patillo, the detention was not unlawful. The Court therefore finds for all Defendants on the false imprisonment claim.

Assault and battery presents a different problem. Georgia law provides that for causes of action for "a physical injury done to another...whatever may be the intention of the actor, unless he shall be justified under some rule of law," Ga. Code Ann. § 105-601, and for "any violent injury or attempt to commit a physical injury illegally upon a person." Ga. Code Ann. § 105-602. Damages for these torts, however, would necessarily be in the nature of compensation for emotional distress and humiliation, because neither Patillo's estate nor his siblings can collect damages for his wrongful death. See discussion above. The Court has already awarded such damages for the violation of Patillo's constitutional rights. The Court is not permitted to award double compensation for the same injuries on separate theories of assault and battery and violation of

section 83. Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963). Therefore, the Court will not make a further award to Plaintiff even though Plaintiff apparently is entitled to recovery under Ga. Code Ann. §§ 105-601 and 105-602.

CONCLUSION

The Court DENIES all motions for directed verdict, and DENIES Plaintiff's post-trial motion to amend. On the basis of the foregoing analysis, the Court finds for Plaintiff and against Defendants Craig and Sampson, and AWARDS $1,000 in general damages and $4,000 in punitive damages against these Defendants. The Court finds for Plaintiff and against Defendants Sampson and the City of Atlanta and AWARDS $20,000 in general damages against these Defendants. The Court also AWARDS Plaintiff the costs of her action, against Defendants Craig, Sampson and the City of

Atlanta, and also AWARDS Plaintiff attorney's fees against these three Defendants in an amount yet to be determined. The Court finds for Defendants Jackson, Brown and Napper and against Plaintiff.

SO ORDERED, this 21st day of June, 1982.

S/ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EMMA F. GILMERE, Individually and as Administratrix of the Estate of Thomas E. Patillo and for the benefit of his next of kin,

Plaintiff,

v.

CITY OF ATLANTA, GEORGIA, et al.,

Defendants.

CIVIL ACTION NO. C80-181

ORDER

This civil rights action arose from the death of Thomas Patillo, who was shot and killed on January 1, 1980 by Defendant R. C. Sampson, an Atlanta Police Officer. Plaintiff Gilmere, Patillo's sister and executrix, brought this action under 42 U.S.C. § 1983, alleging that Defendants had deprived Patillo of several constitutional rights. Among the Defendants were Sampson,

his fellow officer C. C. Craig, and the City of Atlanta. On June 21, 1982, the Court issued findings of fact and conclusions of law. The Court found two separate violations of Patillo's constitutional rights; Craig and Sampson had struck Patillo without provocation, and Sampson had unjustifiably shot and killed Patillo. For the first of these violations, the Court awarded compensatory damages of $1,000 and punitive damages of $4,000 against Sampson and Craig. For the second violation, the Court awarded compensatory damages of $20,000 against Sampson and the City of Atlanta.

Plaintiff has now moved to alter or amend the judgment to increase the amount of damages awarded against Sampson and the City of Atlanta for the killing of Patillo. The Clerk has not entered judgment, because the amount of the attorney's fees to be

awarded to Plaintiff has yet to be determined; the Court will therefore treat Plaintiff's motion as a motion to amend its conclusions of law.

Plaintiff contends that the proper measure of damages under section 1983 for Sampson's killing of Patillo is the full value of Patillo's life. In its conclusions of law, the Court rejected this argument. Because Patillo's next of kin were his brothers and sisters, the Court held that his death created no state law wrongful death action. Noting that 42 U.S.C. § 1988 required the Court to employ state law as "the principal reference point in determining the survival of civil rights actions," Robertson v. Wegmann, 436 U.S. 584, 589-90 (1978), the Court held that there could be no recovery for wrongful death damages in this action.

In holding that Patillo's death would create no action for wrongful death because he left neither widow nor child, the Court relied on Ga. Code Ann. § 105-1302. That statute creates an action for wrongful death, but specifies that it must be brought by the decedent's widow or child. The Court was not aware that this limitation on the cause of action had effectively been removed by Ga. Code Ann. § 105-1309. Section 105-1309 provides:

> In cases where there is no person entitled to sue under the foregoing provisions of this Chapter [including section 105-1302]...the administrator or executor of the decedent may sue for and recover and hold the amount recovered for the benefit of the next of kin. In any such case the amount of the recovery shall be the full value of the life of the decedent.

Therefore Plaintiff, as Patillo's administratrix, could have sued for Patillo's wrongful death, and held any recovery for the benefit of Patillo's next of kin. As

the Court stated in its June 21 Order, Robertson requires the Court to base its decision as to the survival of her section 1983 cause of action on state law; thus the Court erred in relying on section 105-1302.

It does not necessarily follow that the Court must employ state law regarding the amount of damages, however. The Supreme Court has considered the question of the measure of damages under section 1983 only once, in Carey v. Piphus, 435 U.S. 247 (1978). In Carey, the Court stated that state tort law "provide[s] the appropriate starting point" for the inquiry into the proper measure of damages under section 1983. Id. at 258. The Court then noted that "tort rules of damages will [not] provide a complete solution to the damages issue in every case." Id. Tort law will not be helpful, for instance, if there is no tort law analogue for the

constitutional violation. Id. In this case, however, there is a tort law analogue, in the wrongful death action under Ga. Code Ann. §§ 105-1302 and 105-1309; those laws provide for "the full value of the life of the decedent" as the measure of damages. Where such an analogue exists, the Carey Court Stated, "it may be appropriate to apply the tort rules of damages directly to the § 1983 action." 435 U.S. at 258 (emphasis added). In Carey, then, the Court was quite careful not to require the incorporation of state law torts damages rules into suits under section 1983, as it had required the adoption of state law regarding the abatement of torts actions in Robertson. Indeed, Carey has generally been read as inviting the federal courts to adopt a federal common law of damages in section 1983 actions, based on state tort law

theory but not entirely dependent on it. See Robertson, 436 U.S. at 597 (Blackmun, J., dissenting); Love, Damages: A Remedy for the Violation of Constitutional Rights, 67 Calif.L.Rev. 1242, 1244 n.12 (1977); Note, Damage Awards for Constitutional Torts: A Reconsideration After Carey v. Piphus, 93 Harv.L.Rev. 967, 986 (1980); see also Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239-40 (1969) (holding that compensatory damages for deprivation of a federal right under 42 U.S.C. § 1982 "are governed by federal standards, as provided by Congress in 42 U.S.C. § 1988"). The Court does not believe that it is required to award the full value of Patillo's life to his estate, then; that measure of damages merely provides "the starting point."

The Carey Court held that "the compensation principle" should determine the

measure of damages under section 1983. 435 U.S. at 255-56. As the Court noted in its June 21 Order, Patillo's next of kin did not depend on him for financial support. Thus an award of the full value of Patillo's life would over-compensate them for their financial loss. Therefore it is proper for the Court to award some lesser amount. The Court has not changed its opinion that $20,000 would adequately compensate Patillo's estate for the civil rights violation he suffered at the hands of Sampson.

Plaintiff suggests that she is entitled to damages in the amount of the full value of Patillo's life on a different theory, however. She contends that her Complaint set forth a pendent state law cause of action for wrongful death, and that she established Defendants' liability

at trial for wrongful death as well as for civil rights violations.

Plaintiff did not plead a cause of action for wrongful death in her Complaint. In relevant part, the only paragraph on which she relies alleges

> That as a direct and approximate [sic] result of all of the above THOMAS E. PATILLO met his untimely death and was therefore deprived of his rights, privileges and immunities guaranteed him under the Fourth, Eighth and Fourteenth Amendments to the Constitution of the United States, Title 42 U.S.C. 1983 and 1988, to remain free from unlawful death, intrusions upon his property and person, physical abuse, cruel and unusual punishment and deprivations of his life and liberty without due process of the law.

Complaint at ¶ 23. The next paragraph, on which Plaintiff does not rely, states "that the defendant's [sic] actions are the proximate cause of the death of THOMAS E. PATILLO and the Plaintiff is entitled to recover the full value of his life." Id. ¶

24. These two paragraphs are part of Plaintiff's "First Cause of Action." It is clear that in this "cause of action" Plaintiff attempted somewhat inartfully to set forth a claim under section 1983 for violations of Patillo's constitutional rights. Plaintiff did not plead a wrongful death claim in the "cause of action;" she merely mentioned Patillo's death as a violation of his civil rights and as suggesting a possible measure of damages. The Complaint also contains a "Second Cause of Action" specifically stating a state law claim for assault and battery, and a "Third Cause of Action" specifically stating a state law claim for false imprisonment, and the Court later permitted Plaintiff to amend her Complaint to include a state law claim for false arrest. See Order entered August 4, 1981. Had she so desired, Plaintiff could easily have pleaded a specific

state law claim for wrongful death; she did not.

Plaintiff contends, however, that a wrongful death claim was presented and tried at trial, and Defendants failed to object to the admission of evidence relevant to this claim. Consequently they impliedly acquiesced in Plaintiff's maintenance of a wrongful death action, Plaintiff asserts, and she is entitled to amend her Complaint to allege such a cause of action and to collect wrongful death damages. In support, Plaintiff cites Fed.R.Civ.P. 15(b), which provides, "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respect as if they had been raised in the pleadings."

Plaintiff's argument is premised on Defendants' "implied consent" to the trial

of the wrongful death claim. Such consent is routinely implied where a party has failed to object to the admission of evidence that is clearly relevant to an issue not pleaded in the complaint. See, e.g., Metropolitan Life Insurance Co. v. Fugate, 313 F.2d 788 (5th Cir. 1963); 6 C. Wright & A. Miller, Federal Practice and Procedure § 1493 (1971), and cases cited therein at 463 n.68. It is true that Plaintiff introduced evidence relevant to a wrongful death claim at trial, and Defendants did not object. However, such evidence was also relevant to Plaintiff's section 1983 claim. Plaintiff cannot rely on the introduction of evidence relevant to an issue already in the case to show Defendants' consent to the trial of a new issue absent a clear indication to Defendants that Plaintiff was attempting to raise this issue. International Harvester Credit Corp. v. East Coast Truck and R.V.

Sales, Inc., 547 F.2d 888, 890 (5th Cir. 1977); Wirtz v. Savannah Bank & Trust Co., 362 F.2d 857, 861 (5th Cir. 1966); cases cited in C. Wright & A. Miller, supra, at 466 n.71. There was no such clear indication in this case.

If there had been, then Defendants might well have presented additional defenses. Defendants may have chosen to present evidence and to argue Patillo's comparative or contributory negligence, for example, in getting drunk and then attempting to flee from Sampson and Craig. These defenses are irrelevant to a section 1983 claim, but could have served to reduce or eliminate any recovery for wrongful death. Another defense that the City of Atlanta might have raised is municipal immunity. Ga. Code Ann. § 69-307 provides: "A municipal corporation shall not be liable for the torts of policemen or other officers

engaged in the discharge of the duties imposed on them by law." This immunity applies to intentional torts as well as negligent acts by police officers. Tucker v. Thompson, 421 F Supp. 297, 299 (M.D. Ga. 1976), and cases cited therein. Thus the City of Atlanta, one of the Defendants who Plaintiff contends impliedly consented to the trial of a wrongful death action, could not be held liable for Patillo's wrongful death.

Even under the liberal pleading rules established by the Federal Rules of Civil Procedure, Defendants are entitled to notice of the claims they must defend against. It would be inequitable to permit Plaintiff to add a wrongful death claim at trial without clear notice to Defendants, who must be given a fair opportunity to plan their defenses to meet this claim. Cook v. City of Price, 566 F.2d 699, 702

(10th Cir. 1977); 6 C. Wright & A. Miller, supra, at 467. Furthermore, the City of Atlanta could not be held liable on a wrongful death theory. For both these reasons, the Court therefore denies Plaintiff's belated request to add a wrongful death claim to her Complaint, and to collect damages for wrongful death.

On the basis of the foregoing analysis, the Court has determined that Plaintiff is not entitled to additional damages or for the violation of Patillo's constitutional rights, and that the Plaintiff did not bring and cannot now add a pendent state law wrongful death claim. The Court therefore DENIES Plaintiff's Motion to Alter or Amend.

SO ORDERED, this 6th day of August, 1982.

S/ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

[737 F.2d 894]

EMMA F. Gilmere, individually and as Administratrix of the Estate of Thomas E. Patillo and for the benefit of this next of kin, Plaintiff-Appellee, Cross-Appellant,

v.

CITY OF ATLANTA, GEORGIA, et al.,

Defendants-Appellants,
Cross-Appellees.

EMMA F. GILMERE, Plaintiff-Appellee, Cross-Appellant,

v.

CITY OF ATLANTA, et al., Defendants-Appellants, Cross-Appellees.

Nos. 82-8457, 82-8760

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

July 9, 1984

Appeals from the United States District Court for the Northern District of Georgia.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EMMA F. GILMERE,
Plaintiff

v. C.A. No. C80-181

CITY OF ATLANTA, GEORGIA, et al.,
Defendants

ORDER

This Section 1983 action is before the court pursuant to the court's direction that the parties submit briefs on two issues in light of the Eleventh Circuit's October 15, 1985 remand to this court. Specifically, the court directed the parties to address whether the Eleventh Circuit's finding that Defendants Sampson's and Craig's actions violated the Fourth Amendment requires an additional award of damages beyond the court's June 21, 1982 award. Further, the court directed the parties to address whether, in light of the Eleventh

Circuit's opinion, any pendent state law claims are viable against any Defendants. The parties having submitted their briefs, the court will consider each of these issues.

The Eleventh Circuit found that Plaintiff established Fourth Amendment as well as substantive due process violations based on Defendants Craig and Sampson's unwarranted intrusion on and shooting of Thomas Patillo. The question now before the court is whether the Fourth Amendment violations give rise to additional damages beyond this court's previous award. The court had awarded Plaintiff $20,000 for the shooting of Thomas Patillo, $1,000 for the unprovoked striking of Patillo, and $4,000 punitive damages for Officers Craig and Sampson's use of excessive force.

In her brief, Plaintiff reargues

that the court's damage award should be based on Georgia wrongful death principles and that under these principles Plaintiff should receive the full value of Patillo's life. Plaintiff argues at great length that such an award is more appropriate that the court's $20,000 award for Patillo's shooting. However, Plaintiff does not address the question whether the Eleventh Circuit's holding that Patillo's Fourth Amendment as well as substantive due process rights were violated warrants an award of additional damages. Plaintiff suggests that the proper measure for compensating the constitutional violations is higher that this court's previous award, but does not specifically discuss whether Plaintiff should be compensated for the dual constitutional violations of decedent's substantive due process and

unreasonable search and seizure rights.

Defendants maintain that the issues of dual compensation is decided by the Court in Memphis Community School District v. Stachura, 477 U.S. __, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986). In Stachura, the Court held that a Section 1983 Plaintiff may recover damages only as compensation for injuries actually suffered and cannot recover for the "value" of the right which has been violated. The Court held that damages could be awarded in Section 1983 cases only for the actual injury suffered and not for the abstract assessment of the value of the right.

In the instant case, the injury actually suffered by Patillo was the beating and shooting by the Officers Craig and Sampson. The court has awarded Plaintiff damages for these

constitutional violations. While the beating and shooting violated both Patillo's substantive due process rights and Fourth Amendment rights, Plaintiff can receive compensation only for the injuries incurred as a result of these actions. Stachura, requires that the reference point for calculating damages is the injury rather than the value of the constitutional right. Therefore, the court may not award additional damages on the grounds that the same injury reflected separate Fourth and Fourteenth Amendment violations. Accordingly, Plaintiff is not entitled to additional damages beyond the $25,000 previously awarded under Sections 1983 and 1988.

The second issue before the Court on remand is whether Plaintiff has any viable state law claims against any Defendants. Plaintiff argues that the

court should award damages for the wrongful death, false arrest, false imprisonment, assault and battery, and failure to provide adequate medical care.

Plaintiff argues that a wrongful death action has been adequately plead and tried to the court as the finder of fact. Plaintiff further argues that even if the wrongful death action were not adequately plead, she should be permitted to amend the pleadings to conform to the evidence presented at trial pursuant to Fed. R. Civ. P. 15(a). Plaintiff has made this argument before and the court rejected it in its order dated August 9, 1982. In that order, the court found that because of same or similar evidence would have been presented on both Plaintiff's Section 1983 claim and a purported wrongful death action, Defendants cannot be said to have given

their implied consent to the wrongful death action. The court noted that Defendants may have defended a wrongful death action by arguing contributory negligence or municipal immunity, arguments which would not be made in defending a Section 1983 action and, therefore, Plaintiff may not amend the pleadings to conform to the evidence presented at trial. Accordingly, Plaintiff may not recover any damages on the basis of a state law wrongful death action.

Plaintiff also argues that damages should be awarded on the false arrest and false imprisonment claims. In its original June 21, 1982 order, the court denied Plaintiff recovery for false arrest and false imprisonment because the court found that, under Georgia law, Defendants Craig and Sampson had probable

cause to arrest Patillo. O.C.G.A. Section 51-7-3 provides that lack of probable cause exists "when the circumstances are such as to justify a reasonable man that the accuser had no ground for proceeding but his desire to injure the accused." Based on the positive identification of Patillo as the man who had threatened the driver of the red van with a gun and Patillo's immediate flight attempt, this court found that Officers Craig and Sampson had probable cause to arrest Patillo. Accordingly, the court denied Plaintiff's claim for false arrest. Since the arrest was not unlawful, Patillo was not unlawfully detained, and, therefore, the court denied Plaintiff was aim (sic) for false imprisonment.

The Eleventh Circuit found that the beating and shooting of Patillo violated

Patillo's interest in his bodily security and, consequently violated his Fourth Amendment rights. However, this does not necessarily signify that Officers Craig and Sampson were without probable cause, as defined by O.C.G.A. Section 51-7-3, in initially detaining Patillo. Patillo had been identified by the complainant - the man in the red van - as the individual who threatened him with a gun and Patillo attempted to flee as Craig and Sampson led him away from the house. Accordingly, Officers Craig and Sampson had probable cause to remove Patillo to the patrol car for further questioning.

However, Officers Craig and Sampson did not have probable cause to beat Patillo about the head as they led him to the car nor did Sampson have probable cause top shoot Patillo in the ensuing scuffle by the patrol car. The Eleventh

Circuit en banc opinion indicated that Officers Craig and Sampson had little cause to fear for their own safety because Patillo was smaller than both of them and was also intoxicated. Considering the subsequent beating and shooting as a continuation of the initial detention, Officers Craig and Sampson did not have probable cause for their subsequent actions in arresting Patillo. Consequently, these actions would constitute false arrest as well as false imprisonment since the detention was unlawful.

Nevertheless, the same actions - the beating and shooting - which give rise to a false arrest and false imprisonment claim also give rise to Plaintiff's Section 1983 and assault and battery claim. The court already awarded $1,000 in damages for Craig and Sampson's

beating and $20,00 for the shooting. Thus, the existing damage award has already compensated Plaintiff for Patillo's injuries which he incurred as a result of the false arrest and imprisonment, assault and battery, and Fourth and Fourteenth Amendment violations. The Supreme Court has made clear in Carey v. Piphus, 435 U.S. 247 (1978) and Stachura, supra, that damages are to be awarded only for actual injuries. Furthermore, it is not proper to award separate damages for the same injury based upon separate theories of recovery. In Corriz v. Naranjo, 667 F.2d 892, 896 n.1 (10th Cir. 1981), the court suggested that when there is a possibility of double recovery for closely related Section 1983 and pendent state law claims, one method to prevent double recovery is to merge the two

theories of recovery. In light of this precedent, no additional damages for Fourth Amendment, false arrest and false imprisonment, or assault and battery claims are appropriate.

Plaintiff also argues that damages should be awarded for Officer Craig and Sampson's failure to administer medical care after Patillo was shot. Craig and Sampson did not move Patillo nor examine his wounds even though Craig found a slight pulse just after Patillo was shot. As it is not clear that Craig or Sampson should have done more than call for medical assistance, the court does not award damages on this cause of action.

Plaintiff further argues that, even though the Eleventh Circuit en banc opinion found that the City of Atlanta was not liable for Patillo's injuries under Section 1983, the City should still

pay the damage award as well as all costs and fees. Therefore, Plaintiff asserts that, because Craig and Sampson acted in their official capacity, the public entity which Officers Craig and Sampson represented is liable for damages. See Brandon v. Holt, 469 U.S. 464 (1985). However, according to the Court's clear definition of personal and official capacity suit in Kentucky v. Graham, ___U.S. ___, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985), the instant action is one against Officers Craig and Sampson in their personal capacity. In Graham, the Court defined a personal capacity suit as one brought against officials acting under color of state law. Id., 87 L.Ed.2d 114 at 122. An official capacity suit is one in which the governmental entity is the "moving force" behind the constitutional deprivation. Id., at 122.

As the Eleventh Circuit en banc opinion found that the City of Atlanta was not liable for Craig and Sampson's actions, the City of Atlanta cannot be said to have been "the moving force" behind these actions. Therefore, Plaintiff's action is clearly one against Officers Craig and Sampson in their personal capacity. In accord with Kentucky v. Graham, the City of Atlanta is not liable for damages, costs or fees assessed against the officers.

In summary, the court does not award additional damages against any Defendants for either Fourth Amendment violations or pendent state law claims as such an award would be duplicative. The previous award of $1,00 for the beating of Patillo is based on the Fourth and Fourteenth Amendment violations as well as false arrest and imprisonment and assault and

battery claims. Similarly, the $20,000 award for the shooting is based on Fourth and Fourteenth Amendment violations and assault and battery. The $4,000 award of punitive damages for excessive force in the unprovoked beating is based on Plaintiff's Section 1983 claims and assault and battery. Damages, costs or fees cannot be assessed against the City of Atlanta.

The substantive issues having been resolved, the Parties are hereby DIRECTED to file briefs on the award of attorney's fees and costs. Plaintiff shall have twenty (20) days from date of entry of this order to file her brief and Defendants shall have twenty (20) days thereafter to file their response. Any reply brief the Plaintiff wish to file shall be filed ten (10) days thereafter.

SO ORDERED, this 23 day of December,

1986.

S/Orinda D. Evans

United States District Judge

APPENDIX III

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 87-8614

EMMA F. GILMERE, Individually and Administratrix of the Estate of THOMAS E. PATILLO and for the benefit of his next of kin,
Plaintiff-Appellant

versus

CITY OF ATLANTA, GEORGIA, et al.,
Defendants

Appeal from the United States District Court For the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion January 30, 11 Cir., 1988)

(March 6, 1989)

Before FAY and CLARK, Circuit Judges, and GONZALEZ*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions(s) of Rehearing In Banc are

DENIED

ENTERED FOR THE COURT:

S/Peter Fay
United States Circuit Judge

*Honorable Jose A. Gonzalez, Jr., U.S. District Judge for the Southern District of Florida, sitting by designation.

APPENDIX IV

(864 F.2d 734

Emma F. GILMERE, Individually and as Admistratrix of the Estate of Thomas E. Patillo and for the benefit of his next of kin, Plaintiff-Appellant,

v.

CITY OF ATLANTA, GEORGIA, R.C. Sampson, and Carroll Charles Craig, Defendants-Appellees.

No. 87-8614

United States Court of Appeals
Eleventh Circuit
Jan. 30, 1989

Rehearing and Rehearing in Banc
Denied March 6, 1989

Appeal from the United States District Court for the Northern District of Georgia.

Before FAY and CLARK, Circuit Judges, and Gonzalez*, District Judge.

GONZALEZ, District Judge:

This is the third time this action

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*Honorable Jose A. Gonzalez, Jr., U.S. District Judge for the Southern District of Florida, sitting by designation.

has been before us.[2] Appellant Emma Gilmere, as Administratrix of her brother's estate brought this suit against appellees R.C. Sampson, Carroll Charles Craig, their supervisors, and the City of Atlanta, Georgia, under 42 U.S.C. SS 1983 for violations of her brother's fourth, eighth and fourteenth amendment rights and under state tort law. Sampson and Craig are police officers in the city of Atlanta who beat, shot, and killed Gilmere's brother, Thomas Patillo.

After a non-jury trial, the district court found Craig, Sampson and the City of Atlanta liable for violating Patillo's substantive due process rights and found for the defendant on Plaintiff's state law claims for false arrest, false

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[2] The facts of this case are set out in the prior opinions of this court. See Gilmere v. City of Atlanta, 737 F.2d 894 (11th Cir. 1984) on reh'g 774 F.2d 1495 (11th Cir. 1985).

imprisonment and assault and battery.[3] The court awarded $1,000 in general damages and $4,000 in punitive damages against Craig and Sampson for the beating and $20,000 in general damages against Sampson and the City of Atlanta for the shooting and death of the decedent. The court found that punitive damages for the shooting were not warranted. Gilmere was also awarded costs and attorney's fees.

Sampson and the City of Atlanta filed an appeal. After rehearing en banc, this court reversed the finding of liability as to the City of Atlanta and affirmed the liability of Craig and Sampson. In addition, we found that the beating and shooting of the decedent

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[3] The district court found that Sampson and Craig did commit an assault and battery, but refused to award additional compensation on the ground that it would lead to double recovery for the same injuries on separate theories of recovery.

violated his fourth amendment interest in bodily security and remanded plaintiff's state law claims for reconsideration in light of that finding. We also vacated the award of attorney's fees and costs and directed reconsideration of that award.

On remand, the district court declined to award additional damages for the fourth amendment violations. The district court reasoned that the $25,000 previously awarded provided adequate compensation for the actual injuries suffered by the decedent and an award of additional damages would result in a double recovery. The court also denied additional recovery for appellant's state tort claims on the same ground. Appellant was awarded $17,790.00 plus interest for costs and attorney's fees.

Emma Gilmere appeals, contending

that the district court erred in not awarding state statutory damages for wrongful death or similar compensatory damages for the deprivation of life. Gilmere also argues that the trial court erred in not awarding additional damages on remand for the violations of the fourth amendment and state tort law. The other issues on appeal concern the award of attorney's fees and the liability of the City of Atlanta for the judgment. We shall consider each issue separately below.

DAMAGES

Appellant argues that she is entitled to recover damages for the full value of decedent's life pursuant to Georgia law. The measure of damages for wrongful death actions under Georgia law is determined by statute. See Ga. Code Ann. Sec. 51-4-1. The Georgia wrongful

death statute permits recovery by the personal representative on behalf of the next of kin for the full value of the life of the decedent. Ga. Code Ann. Sec. 51-4-5. Presumably, appellant believes that the amount of damages awarded under the Georgia wrongful death statute would far exceed the $20,000 awarded by the district court for the shooting and death of the decedent.

Appellant makes several arguments to support her claim for state statutory damages. First, she contends that the complaint properly raised a claim under the wrongful death statute, or alternatively, that the state wrongful death claim was tried by the implied consent of the parties. Appellant also argues that under 42 U.S.C. Sec. 1983, the district court was required to look to state law to determine the measure of

damages for the section 1983 claim.

I.

[1] After a careful review of the record, we conclude that appellant is not entitled to recover state statutory damages for the death of her brother. First, the complaint does not allege a pendent state cause of action for wrongful death. Count I of the complaint alleges that the death of Thomas Patillo by the appellees and their conduct deprived Patillo "of his rights privileges and immunities guaranteed him under the Fourth, Eighth and Fourteenth Amendments to the Constitution of the United States, Title 42 U.S.C> 1983 and 1988, to remain free from unlawful death, intrusions upon his property and person, physical abuse, cruel and unusual punishment and deprivation of his life and liberty without due process of law."

(Complaint Par. 23) The complaint goes on to demand recovery of the full value of decedent's life, and funeral and medical expenses and damages.

While it is true that the damages requested are identical to the damages recoverable under the Georgia wrongful death statute, there is no indication in the complaint that appellant intended to raise a pendent claim for wrongful death. The absence of such a claim is made even more conspicuous by the second and third causes of action of the complaint. Those counts specifically allege "further cause of action under the constitution and laws of the state of Georgia" for false imprisonment and assault and battery. In contrast the first count of the complaint alleges and seeks recovery only for the deprivation of the decedent's constitutional rights.

Appellant's own pleadings support the conclusion that the state wrongful death claim was never raised. In her motion to amend complaint, Gilmere made the following statement: "This action is brought pursuant to 42 U.S.C. 1983 and 1988 alleging violations of the civil rights and pertinent state causes of action for assault and battery and false imprisonment." Appellant moved to amend the complaint to add a cause of action for false arrest. Nowhere does Appellant allege a pendent state claim for wrongful death. The district court did not err in finding that the issue of wrongful death was not properly raised prior to trial.

Appellant claims that even if the complaint did not properly raise a wrongful death claim, that the issue was tried by the implied consent of the parties. As support, appellant points to

her Proposed Findings of Fact and Conclusions of Law filed before trial which include wrongful death as one of the claims before the court. Appellant also points to arguments of her attorney at trial that she was pursuing a claim for wrongful death.

"A party cannot be said to have implicitly consented to the trial of an issue not presented by the pleadings unless that party should have recognized that the issue had entered the case at trial." Wesco Manufacturing, Inc. v. Tropical Attractions of Palm Beach, Inc, 883 F.2d 1484, 1486 (11th Cir. 1987) (citations omitted). "Often such consent can be inferred from the failure to object to the introduction of evidence relevant to an unpleaded issue." Id.

[2] On the record before us, we cannot say that appellees implicitly

consented to try the issue of wrongful death. In objecting to the introduction of evidence of funeral expenses, counsel for appellees specifically stated that "there is no allegation in the complaint requesting a prayer for damages for wrongful death. My understanding is this is purely an action for violation of civil rights pursuant to 42 U.S.C. 1983 and 1988, and then the court granted an amendment to allow a false imprisonment pursuant to the state civil section. There is no wrongful death action pending in this court." Counsel for appellant then argued in response that he had raised a wrongful death claim. The district court admitted the evidence, saying that she would consider at a later date what damages could be recovered. The district court ultimately held that appellant could not recover under a claim

for wrongful death. We affirm, noting that the issue was neither expressly nor implicitly tried.

II.

Gilmere argues that the district court erred in not applying the Georgia wrongful death statute to determine the proper amount of damages to be awarded for her Sec. 1983 claim for deprivation of life without due process of law.[1] For the reasons which follow,. we conclude that the district court did not err in refusing to award the full amount of damages recoverable under state law.

The district court recognized that sgtate tort law provides the appropriate starting point for the inquiry into the proper measure of damages undedr Section

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[1]Georgia law permits recovery of the "the full value of the life of the decedent" in actions for wrongful death. Ga. Code Sections 51-4-5(a) and 51-4-1.

1983. See Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). The court then found that an award under state law for the full value of Patillo's life would overcompensate his next of kin because none were dependent upon Patillo for financial support. The copurt determined from the evidence that $20,000 would adequately compoensate Patillo's estate for the injuries he suffered in connection with the violation of due process caused by the shooting. The injuries included physical harm including death, emotional suffering and humiliation.

Gilmere contends, and the dissent agrees, that the district court should have awarded the statutory damages for wrongful death, i.e., the full value of Patillo's life as defined by Georgia law, because there is no suitable federal rule

to define the measure of damages under Section 1983. However, contrary to the dissent's argument, neither 42 U.S.C. Section 1988 nor our predecessor's court decision in Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961), **require** federal courts to apply state law measure of damages as a remedy for a deprivation of constitutional rights.

[3] "Title 42 U.S.C. Section 1988 authorizes courts to look to the common law of the States where this is 'necessary to furnish suitable remedies' under Section 1983" Carey, 435 U.S. at 258, n.13, 98 S.Ct. at 1049, n.13, 55 L.Ed.2d at 260, n.13. Federal courts are to turn to state law in order to fill gaps which may exist in federal law. See Brazier, 293 F.2d at 409. The resort to state law "will permit the full effectual enforcement of the policy sought to be

achieved by the (civil rights) statutes." Id. at 408. Where federal law is sufficient to carry the policies of the civil rights statutes into effect, resort to state law is not necessary. Id.

In Brazier, the Fifth Circuit considered the district court's dismissal of a Section 1983 action brought by the survivors of an individual who had been killed by Terrell County, Georgia police officers. The appellate court turned to state law to hold that a claim under Section 1983 for injuries would survive the death of the victim. Georgia law provided for survival of the decedent's cause of action for injury inflicted upon the survivors. Federal law did not provide for such survival. The Brazier court found that policies behind the civil rights statutes would be fully implemented by resorting to state law to

allow both classes of victims (the decedent and his survivors) to recover for injuries in an action under Section 1983. Id. at 409.

The present action differs from Brazier in one important respect: the plaintiff in the present case did not seek damages for injuries to decedent's survivors. As discussed at length in Part I, supra, appellant's complaint sought relief for injuries suffered only by her brother, not by his survivors. The issues before this court is this: what measure of damages must the district court utilize in fashioning a remedy for the constitutional deprivations suffered by the decedent?[2]

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[2]We reiterate that this is not a case in which damages to the survivors are at issue. Had the survivors sought recovery for their injuries as well as for the decedent's injuries, resort to the state wrongful death statute may well be appropriate.

"Compensatory damages for deprivation of a federal right are governed by federal standards, as provided by Congress in 42 U.S.C. Section 1983..." Sullivan Little Hunting Park, Inc., 396 U.S. 229, 239, 90 S.Ct. 400, 406, 24 L.Ed/.2d 386 (*1969). The Supreme Court has construed Section 1988 to mean that "both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes.." Id. at 240, 90 S.Ct. at 403, 24 L.Ed.2d 386. The district court's task is to "adapt[]common law rules of damages to.provide fair compensation for injuries caused by the deprivation of a constitutional right." Carey, 435 U.S. at 258, 98 S.Ct. at 1049, 55 L.Ed.2d 252.

[4] The focus of any award of damages under Section 1983 is to

compensate for the actual injuries caused by the particular constitutional deprivation. Memphis Community School District v. Stachura, 477 U.S. 299, 106 S.Ct. 2537, 2544, 91 L.Ed.2d 249 (1986). The amount of damages to be awarded should be grounded in a determination of plaintiff's actual losses. Id. The Supreme Court has stated that Section 1983 remedies are " supplementary to any remedy any state might have," and "have no precise counterpart in state law." Wilson v. Garcia, 471 U.S. 261, 272, 105 S.Ct. 1938, 1945, 85 L.Ed.2d 254 (1985) (citations omitted). The Court added that "it is 'the purest coincidence' when state statutes or the common law provide for equivalent remedies..." Id. (citations omitted). Thus, there is no requirement that a state remedy be employed to compensate for a violation of

a federal interest. In fact, the Court has noted that under Section 1988, "resort to State law...should not be undertaken before principles of federal law are exhausted." Id. at 268, 105 S.Ct. at 1943, 85 L.Ed.2d 254.[3]

[5] Federal law provides for compensation for injuries caused by constitutional deprivation, Stachura, 477 U.S. 299, 106 S.Ct.2537, 91 L.Ed.2d 249, and allows the imposition of punitive damages even in cases where such recovery may not be made under state law. Smith v. Wade, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983). The courts are charged with the duty of evaluating the principles of damages which have evolved within the common law and fashioning a

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[3]This rule is applicable to the determination of damages as it is to the determination of the proper statute of limitations in a Section 1983 case, which was the issue before the court in Wilson.

remedy appropriate to the injury.

[6] The dissent argues that by not applying the state measure of damages for wrongful death we are casting courts to sea without an anchor and are inviting arbitrary, subjective valuations of human life. We disagree. Although the principles of compensation may be difficult to apply to particular cases, as the Supreme Court has recognized, courts "are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of (constitutional) rights." Carey, 435 U.S. at 259, 98 S.Ct. at 1050, 55 L.Ed.2d 252 quoting Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388,409, 91 S.Ct. 1999, 2011, 26 L.Ed.2d 619 (1971) (Harlan, J., concurring in judgment)

Furthermore, applying a federal

standard of damages for injuries suffered by a decedent will promote consistency in the type and amount of damages awarded. Were we to follow the dissent's rule and award the damages provided in the state wrongful death statute, there would be three separate measures of damages for the unconstitutional deprivation of life in this circuit: the damages permitted by the wrongful death statutes of Alabama, Florida and Georgia.[4] Under that scenario, it is not inconceivable that a Plaintiff in one state would be awarded substantially more damages under her state's wrongful death statute than another Plaintiff who happens to live in a state with a different measure of damages for wrongful death. Such a result would not only lead to

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[4]See Ala. Code Section 6-5-410; Ga. Code Sections 51-4-1 and 51-4-5; Fla. Stat. Ann. Section 768.21

inconsistent awards, it would be prohibited by Section 1983.[5]

For the above stated reasons, we hold that the district court did not err in refusing to award the state wrongful measure of damages to compensate for the violation of the decedent's constitutional rights. We now turn to the amount of the award.

The district court determined on the evidence in the record that an award of $20,000.00 would provide adequate compensation for the injuries suffered by the decedent as a result of the shooting.

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[5]The Alabama wrongful death statute, Ala. Code Section 6-5-410, provides only for assessment of punitive damages. Carter v. City of Birmingham, 444 So.2d 373 (Ala. 1983) cert. denied, 467 U.S. 1211, 104 S.Ct. 2401, 81 L.Ed.2d 357 (1984). Because the statute is inconsistent with the rule that damages in Section 1983 actions are to be compensatory, reliance on the Alabama wrongful death statute would not be proper under Section 1988. See Weeks v. Benton, 649 F.Supp. 1297 (S.D.Ala. 1986).

The court also determined that the record did not support an award of punitive damages against appellee Sampson.

The district court has a great deal of discretion in deciding the level of damages to be awarded. Stallworth v. Schuler, 777 F.2d 1431 (11th Cir. 1985). "in reviewing the amount of damage awards, this court is generally limited to the question of whether the trier of fact abused its discretion." Self v. Great Lakes Dredge and Dock Co., 832 F.2d 1540, 1552 (11th Cir. 1987). "Although the award was small, it was not 'unconsciously inadequate," therefore, we may not disturb the award on appeal." Id. quoting Kramer v. Keys, 643 F.2d 382, 386 (5th Cir. Unit A Apr. 1981) (citation omitted from original).

[7] The dissent argues that the amount awarded by the district court was

inadequate in two respects. One, it shocks the conscience of the court. Two, the award does not adequately consider the policy of deterrence inherent in the civil rights statutes.

In response we cite the identical language relied upon by the dissent. As the Supreme Court recognized, "Section 1983 presupposes that damages for actual harm ordinarily suffice to deter constitutional violations." Stachura, 477 U.S. at 309, 106 S.Ct. at 2544, 91 L.Ed.2d 249. Because we find that the district court did not abuse its discretion in determining the amount of attorney's fees, we find that the principles of deterrence are adequately served by the amount awarded. Accordingly, we affirm the district court's award of damages.

III.

[8] We likewise find no error in the district court's refusal to award additional damages for the deprivation of Patillo's fourth amendment right to bodily security. The district court found that the injuries suffered by Patillo as a result of the fourth amendment violation were identical to the injuries which gave rise to Patillo's substantive due process claim. The court reasoned that it could not award additional damages simply because the same injuries reflected separate constitutional violations. As the Supreme Court held in Stachura, compensatory damages in Section 1983 cases are to be based upon the actual injuries caused by the deprivation of a constitutional right and not upon the abstract "value" or "importance" of the right in question. Stachura, 477 U.S.

299, 106 S.Ct. 2537, 91 L.Ed.2d 249. Given that the district court found that the separate violations of the fourth and fourteenth amendments resulted in identical injuries, it properly denied additional compensation for the fourth amendment violations.

Similarly, we cannot find that the district court erred in refusing to award additional damages for the false arrest, false imprisonment, and assault and battery of Patillo. The court found that the beating and shooting of Patillo gave rise to liability for those torts as well as liability under Section 1983. However, the injuries caused by the state torts were identical to the injuries suffered as a result of appellee's unconstitutional conduct: physical harm, emotional suffering and humiliation. The district court's refusal to award

additional damages for identical injuries was not error. For the foregoing reasons, the district court's award od damages is affirmed.

ATTORNEY'S FEES

Appellant Emma Gilmere also appeals the award of costs and attorney's fees made by the district court. She contends that the district court abused its discretion in failing to make an adequate award of attorney;s fees.

The proceedings over attorney's fees in this case violates the idea that "(a) request for attorney's fees should not result in a second major litigation." Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983) The district court has twice considered the issue of attorney's fees. As we discuss below, the issue must go before the district court once more.

PUBLISHER'S NOTE:

The following pages are unavailable for filming

135 thru 139

in the trial of this case. The court carefully reviewed the hours which fee counsel claimed were expended and precisely explained which hours were disallowed and showed why an award of those hours was inappropriate. See Norman, 836 F.2d at 1304. The hours allowed for trial were reasonable and within the court's discretion.

[12] Calculating the hours expended is only one-half the analysis in considering an award of attorney's fees. The court must also determine the reasonable hourly rate in order to estimate the value of the lawyer's services. Id. at 1299. "A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience and reputation." Id.

In calculating the hourly rate by which attorney's fees were determined, the district court considered the customary fee in similar cases, the amount involved and the results obtained, and the experience, reputation and ability of counsel. These standards were set forth in the leading case at the time the award was made. See Copper Liquor, Inc., v. Adolph Coors Co., 624 F.2d 575, 583 (5th Cir. 1980); Johnson v. Georgia Highway Express,Inc., 488 F.2d 714 (5th Cir. 1974). Although the standard for setting a reasonable hourly rate has evolved somewhat since Johnson, the analysis made by the district court does not differ greatly from the analysis set forth in our opinion in Norman, 836 F.2d 1292.

[13] Regardless of the standard by which the hourly fee was determined, we

think that $40.00 an hour for Mr. Raffauf's time is inadequate compensation. We do not lightly upset the district court's findings. However, the hourly fee awarded in this case so greatly contradicts our own "knowledge and experience concerning reasonable and proper fees," that we find the trial court abused its discretion in determine the hourly rate. See Norman, 836 F.2d at 1303 (trial or appellate court is an expert on the issue of fees and may form its own independent judgment on reasonable and proper fees).

We cannot give meaningful review to the district court's award for the appeal and remand. The orders granting these fees fail to set forth either the hourly rate or the number of hours the court considered reasonably expended at these stages of litigation. See Norman, 836

F.2d at 1304. We note that we do note take issue with the district court's decision not to award the full amount requested. However, for the reasons just given we are unable to review the award. In light of the foregoing discussion, we must vacate the award of attorney's fees made by the district court.

LIABILITY OF THE CITY OF ATLANTA

Appellant persists in her opinion that the City of Atlanta is liable for all damages, costs and attorney's fees awarded in this case. Pursuit of this argument on this appeal is frivolous in light of our earlier decision in which we found no liability on the part of the City. See Gilmere, 774 F.2d at 1502-04. The finding of no liability as to the City is the law of the case and appellant may not pursue a judgment against the City.

CONCLUSION

In conclusion, we affirm the damages awarded against R.C.Sampson and carroll Charles Craig. The award of attorney's fees is vacated and remanded for reconsideration of a reasonable hourly rate and for further findings as to the proper award for fees and costs for the appeal and remand.

AFFIRMED in part, VACATED in part and REMANDED.

CLARK, Circuit Judge, concurring in apart and dissenting in part:

Believing that the majority overlooked or misconstrued binding precedent leading it to err in holding "there is no requirement that a state remedy be employed to compensate for a violation of a federal interest" in a wrongful death case brought pursuant to

42 U.S.C. Section 1983, I respectfully dissent from Part II of the damages portion of the opinion and would reverse the district court.

I. THE ISSUE

The issue in this case is as follows: When a district court finds that Atlanta, Georgia police officers violated a person's federal constitutional rights in killing him during an arrest, to what law does the district court look in assessing damages to the estate of the decedent, leaving as his only survivors several brothers and sisters? Binding circuit court precedent as well as Supreme Court precedent requires a district court in Georgia to look to Georgia Code Sections 51-4-5(a) and 51-4-1(1)[1] in assessing damages.

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[1] 51-4-5. Recovery by personal representative for wrongful death and for certain expenses. (a) When there is no person entitled to bring an action for

II. THE DISTRICT COURT ORDERS

The first district court order with respect to damages was entered June 21, 1982. Commencing at [age 22 of the order the district court discussed "Damages for

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the wrongful death of a decedent under Code Section 51-4-2, 51-4-3, or 51-4-4, the administrator or executor of the decedent may bring an action for and may recover and hold the amount recovered for the benefit of the next of kin. In any such case the amount of the recovery shall be the full value of the life of the decedent.

Section 51-4-2 relates to wrongful death of a father or husband, 51-4-3 relates to the wrongful death of a wife or mother, and 51-4-4 relates to the wrongful death of a child.

The "full value of the life of the decedent" is divided into two elements: the gross sum that the defendant would have earned by the end of his life, reduced to present value, and the intrinsic value of decedent's life. Cobb & Eldridge, Georgia Law of Damages Sections 37-6, at 672 (2ed. 1984) (citing cases). Because the measure of damages is the full value of decedent's life to himself, Atlantic V. & W.R.R. c. McDilda, 125 Ga. 468, 54 S.E. 140,141 (1906), evidence of decedent's support for his next of kin is irrelevant in determining the economic value of the decedent's life.

violations of Section 1983." The district court posed the question of whether a decedent's estate is entitled to compensation and stated the following:

> On its face Section 1983 does not answer this question. Because Section 1983 is "deficient" in this respect, 42 U.S.C. Section 1988 requires the Court to apply "the common law, as modified and changed by the Constitution and statutes of the [forum] state...so far as the same is not inconsistent with the Constitution and laws of the United States." The Supreme Court has read Section 1988 as to require the adoption of state law as "the principal reference point in determining survival of civil rights actions." Robertson v. Wegman, 436 U.S. 584, 589,90 [98 S.Ct. 1991, 1994-95, 56 L.Ed.2d 554] (1978). The Court must apply state law, in fact, unless it is inconsistent with the policies underlying section 1983. Id. The Supreme Court has also suggested that state tort law is useful in determining section 1983 damages. Carey, 435 U.S. at 257-58 [98 S.Ct. at 1049].

The district court was correct in this statement of the law. That is the

holding of Brazier v. Cherry, 293 F.2d 401 (5th Cir., cert. denied, 368 U.S. 921, 82 S.Ct. 243, 7 L.Ed.2d 136 (1961)[2] Brazier was a wrongful death action based upon a deprivation of the decedent's constitutional rights and damages were sought under Section 1983. Our predecessor court held that:

> To make the policy of the Civil Rights Statutes full effectual, regard has to be taken of both classes of victims [the victim himself and his survivors] Section 1988 declares that this need may be fulfilled if state law is available.

293 F.2d at 409; See also McQurter v. City of Atlanta, 572 F.Supp. 1401, 1422-23 (N.D.Ga. 1983) (following Carey and applying Section 51-4-1(1) in awarding

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[2] In Bonner v. City of Priochard, 661 F.2d 1206 (11th Cir. 1981) (in banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. Id. at 1209.

damages under Section 1983 to the widow of the man killed by police in Georgia), appeal dismissed, 724 F.2d 881 (11th Cir. 1984)

The district court in its first opinion stated that if the decedent had been survived by a wife or child, those persons could have sought damages under then Section 105-1302,[3] but since the decedent left neither widow nor child, his estate was not entitled to a cause of action and the decedent's estate was foreclosed from collecting damages for his wrongful death. Having no objective measure of damages to apply, the district court concluded that "$20,000 would be adequate compensation" for the deprivation of Patillo's constitutional rights.

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[3]This section was recodified in 1982 as Section 51-4-2

In the court's second order, dated August 6, 1982, in response to the estate's motion to alter or amend the judgment, the court acknowledged that it had previously relied on Section 105-1302 creating an action for wrongful death by a decedent's widow or child and that "the court was not aware that this limitation on the cause of action had effectively been removed by Section 105-1309 [now 51-4-5(a)]."

Nonetheless, the district court went on: "It does not necessarily follow that the Court must imply state law regarding the amount of damages however." (emphasis in the original). The district court referred to Carey v. Piphus, 435 U.S.247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978), and stated that Carey holds that where there is an analogue in state law for determining the proper measure of damages

under Section 1983, "it **may** be appropriate to apply the tort rules of damages directly to the Section 1983 cause of action. 435 U.S. at 258 [98 S.Ct. at 1049]." (emphasis added by the district court). The district court decided that since Patillo's next of kin did not depend on him for financial support,

> the full value of Patillo's life would overcompensate them for their financial loss. Therefore, it is proper for the court to award some lesser amount. The court has not changed its opinion that $20,000 would adequately compensate Patillo's estate for the civil rights violation he suffered at the hands of Sampson.

The district court chose a weak reed in Carey to lean upon when deciding that it did not have to follow Georgia law. Carey states the law very clearly:

> It is not clear, however, that common law tort rules of damages will provide a complete solution in every Section 1983

> case. In some cases the interest protected by a particular branch of common law may parallel closely the interests protected by a particular constitutional right. In such cases, it may be appropriate to apply the tort rules of damages directly to Section 1983 actions. See Adickes v. S.H. Cress & Co., 398 U.S. [144] at 231,232, 90 S.Ct. [1598] at 1641, 26 L.Ed.2d 142 (Brennan. J., concurring and dissenting). In other cases, the interests protected by a particular constitutional right may not also be protected by an analogous branch of the common law torts.

435 U.S. at 258, 98 S.Ct. at 1049. In Carey the Supreme Court was faced with the recovery of damages by students who were suspended from public elementary and secondary schools without procedural due process. That factual context led the court into a discussion of Section 1983 cases that are analogous to common law tort actions and those that are not analogous, such as suspending students

from school.

The third district court order after remand of this case on certain liability issues is dated December 23, 1986 and is the order now on appeal. The court addressed Gilmere's motion to reconsider the $20,000 wrongful death award and denied it with the statement: "While the beating and shooting violated both Patillo's substantive and due process rights and Fourth Amendment rights, plaintiff can receive compensation only for the injuries incurred as a result of these actions."

III. THE MAJORITY OPINION

The majority opinions joins the district court in repudiating 42 U.S.C. Section 1988, binding circuit authority, and Supreme Court cases that dictate application of state law when assessing damages in Section 1983 cases where

federal law or policy neither controls nor conflicts and state law provides an analogue. Additionally, the majority joins the district court in not even mentioning the Supreme Copurt cases that require consideration of deterrence as an element of Section 1983 cases. Yet the most grievous part of the majority opinion is its result: there is now no law in the Eleventh Circuit governing assessment of damages in a Section 1983 wrongful death case.

1. Failure to Provide Standards

The majority's creation of a void in the law with respect to damages in Section 1983 cases is accomplished with the following language:

> The focus of any award of damages under Section 1983 is to compensate for the actual injuries caused by the particular constitutional deprivation. Memphis Community School District v. Stachura, 477 U.S. 299, 106 S.Ct. 2537, 2544, 91 L.Ed.2d 249 (1986).

The amount of damages to be awarded should be grounded in a determination of the plaintiff's actual loses. Id. The Supreme Court has stated that Section 1983 remedies are "supplementary to any remedy any State might have," and "have no precise counterpart in state law." Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938, 1945, 86 L.Ed.2d 254 (1985) (citations omitted). The Court added that "it is 'the purest coincidence'...when state statutes or the common law provide for equivalent remedies..." Id. (citations omitted). Thus there is no requirement that a state remedy be employed to compensate for a violation of a federal interest. In fact, the Court has noted that under Section 1983, "resort to State law...should not be undertaken before principles of federal law are exhausted." Id. at 268, 105 S.Ct. at 1943, 85 L.Ed.2d 254.

Federal law provides for compensation for injuries caused by a constitutional deprivation, Stachura, 477 U.S. 299, 106 S.Ct. 2537, 91 L.Ed.2d 249, and allows the imposition of punitive damages even in cases where such recovery may not be made under state law. Smith v. Wade, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983). The Courts are charged with the duty of evaluating

> principles of damages which have evolved within the common-law and fashioning a remedy appropriate to the injury.

Maj. Op. at 739.

The majority thus relies upon extraneous language in Wilson for its holding that:"there is no requirement that a state remedy be employed to compensate for a violation of a federal interest." Wilson, however, had as its only issue the determination of which statute of limitations would govern the Section 1983 action (and, ironically the Court did turn to state law). Damages were not an issue. In describing the Tenth Circuit's holding in Wilson, the Supreme Court stated:

> Distilling the essence of the Section 1983 cause of action, the court held that every claim enforceable under the statute is, in reality, "an action for injury to personal rights," and that "(h)enceforth, all Section 1983 claims in [the] circuit will be uniformly so characterized for statute of

> limitations purposes." [Garcia v. Wilson, 731 F.2d 640] at 651 [1984]. Accordingly, the appropriate statute of limitations for Section 1983 actions brought in New Mexico was the 3-year statute applicable to personal injury actions.

471 U.S. at 265, 105 S.Ct. at 1941 (footnote omitted).

If by its reference to Wilson the majority means that the federal courts are not required to follow the decisions of state courts with respect to a **remedy**, the majority would be correct. For example, if Georgia law provided that a plaintiff could recover only nominal damages for a wrongful death, it is obvious that federal courts could disregard that state's statute. There is an immense difference, however, between determining that a state's remedy is wholly inadequate and selectively excising those parts of a state's damages

rule that, on a particular occasion, a court may find distasteful.

More importantly, the fact remains that there is no federal damages law on which the district court might have relied, and Wilson makes clear that state law governs in such a situation. As the Court stated in Wilson:

> The language of Section 1988 directs the courts to follow "a three step process" in determining the rules of decision applicable to civil rights claims:
> "First, courts are to look to the laws of the United States 'so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect.' [42 U.S.C. Section 1988] If no suitable federal rule exists, courts undertake the second step by considering application of state 'common law, as modified and changed by the constitution and statute's of the forum state. Ibid. A third step asserts the predominance of a federal interest: courts are to apply state law only if it is not 'inconsistent with the Constitution and laws of the United States.' Ibid."
> Burnett v. Grattan, 468 U.S.

> [42], [49], 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984).
> This case principally involves the second step in the process: the selection of "the most appropriate," or "the most analogous state statute of limitations to apply to this Section 1983 claim.

105 S.Ct. at 1942-43 (footnotes omitted). Had the district court followed this sequence it would have discovered first that there are no cases setting forth a federal standard for calculating damages; the only wrongful death section 1983 cases in this circuit addressing damages in any respect have applied state law. See Brazier v. Cherry, 293 F.2d 401, 409 (5th Cir.) (Georgia law permits damage awards for both harm to the decedent and injury to the survivors), cert. denied, 368 U.S. 921, 82 S.Ct. 243, 7 L.Ed.2d 136 (1961); McQurter v. City of Atlanta, 572 F.Supp. 1401, 1422-23 (N.D.Ga. 1983) (following Carey and applying Ga. Code

Ann. Section 51-4-1(1) in awarding damages under Section 1983 to widow of man killed by police) appeal dismissed, 724 F.2d 881 (11th Cir. 1984). Once the court had made this determination, the only reason for which it might have rejected Georgia law is if, as Wilson dictates, the Georgia law is "'inconsistent with the Constitution and laws of the United States.'" 471 U.S. at 267, 105 S.Ct. at 1942-43 (quoting Burnett v. Grattan, 468 U.S. at 49, 104 S.Ct. [at] 2929). In short, the majority's statement that "(f)ederal law provides for injuries caused by a constitutional deprivation" is misleading - sections 1983 and 1988 merely authorize damage awards without directing how they should be calculated - and the district court should have thus turned to state law, specifically, Ga. Code Ann. Section

51-4-5.

In addition to its general reliance on broad, and inapplicable, statements by the Supreme Court, the majority offers two responses to this argument. First, the majority eschews any reliance whatsoever on Brazier, pointing out that in Brazier, the plaintiffs were seeking damages not only for the injury to their decedent, but for the injury to themselves, while in this case the plaintiff sought damages only for the harm to the decedent. Given that the district court here justified its minuscule award on the fact that the decedent sister would be overcompensated, I find this distinction quite ironic and wholly inappropriate. Second, the majority contends that relying on state law is unsound as a policy matter because such reliance will mean that Plaintiff's

in one state can recover more than plaintiffs in another. What the majority fails to realize is that these state-to-state distinctions are already made, whether wisely or not, with respect to such rules as statutes of limitations. Compare Jones v. Pruett & Maudlin, 763 F.2d 1250, 1256 (11th Cir. 1985) (section 1983 cases in Alabama governed by six-year statute of limitations), with Williams v. City of Atlanta, 794 F.2d 624, 626 (11th Cir. 1986) (section 1983 cases in Georgia governed by two year statute of limitations). In my view, this may be an unfortunate aspect of the way sections 1983 and 1988 were drafted, but it does not give this court license to ignore settled interpretations attempting to show states deference in civil rights cases.

Finally, even assuming that the

majority is correct in asserting that federal law could direct the calculation of damages in Section 1983 actions, its greatest mistake is casting the district courts to sea without an anchor. The majority does not set forth any standards for the district courts to follow in awarding wrongful death damages in Section 1983 actions. Without a standard to determine the amount of damages, the possibility of arbitrariness is increased. Although the trier of fact usually has a good deal of discretion to determine the amount of damages, its discretion is initially limited by the rules on damages it must heed. Stein, Damages and recovery, Section 248, at 355 (1972) The majority's approach invites completely subjective valuations of human life. Such a result is inconsistent with Section 1983. See Stachura, 477 U.S. at

310, 106 S.Ct. at 2545 (arbitrary damages awarded "without any evidentiary basis...would be too uncertain to be of any great value to plaintiffs, and would inject caprice into determination of damages in Section 1983 cases"). The Supreme Court in Wilson spoke specifically of avoiding such uncertainty:

> The experience of the courts that have predicated their choice of the correct statute of limitations on an analysis of the particular facts of each claim demonstrates that their approach inevitably breeds uncertainty and time-consuming litigation that is foreign to the central purposes of Section 1983. Almost every Section 19083 claim can be favorably analogize to more than one of the ancient common law forms of action, each of which may be governed by a different statute of limitations.
> ...
> We conclude that the statute is fairly construed as a directive to select, in each State, the one most appropriate statute of limitations for all Section 1983 claims. The federal interests in uniformity,

> certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored this simple approach.

471 U.S. U.S. at 272-77, 105 S.Ct. at 1945-47 (Emphasis added).

2. **Failure to Account for Deterrence**[4]

The majority also errs in affirming the district court's failure to consider deterrence in awarding Section 1983 damages. The Supreme Court has repeatedly held that deterrence is one of the overriding purposes of Section 1983. See Stachura, 477 U.S. at 306, 106 S.Ct. at 2543; City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 268-70, 101

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[4] From a review of a sampling of past articles on the subject of police shooting and fatalities in the City of Atlanta (there have been 454 articles since 1973), the Reference Department of the Atlanta-Journal Constitution advises that there were in 1973 50 shootings - 19 fatalities; in 1983 15 shootings - 6 fatalities; in 1984 3 fatalities; and in 1987 8 or 9 fatalities.

S.Ct. 2748, 2760-61, 69 L.Ed.2d 616 (1981); Owen v. City of Independence, 445 U.S. 622, 651-56, 100 S.Ct. 1398, 1416-18, 63 L.Ed.2d 673 (1980). Moreover, the Court recently noted in a Section 1983 damages case that compensation and deterrence are mutually dependent rationales: "Deterrence is an important purpose of [the tort] system, but it operates through the mechanism of damages that are compensatory, damages grounded in a determination of [the] plaintiff's actual losses." Stachura, 477 U.S. at 306, 106 S.Ct. at 2543.

By agreeing with the district court that an award of $20,000 would overcompensate Patillo's estate, the majority turns the Court's supposition on its head.

3. **Inadequacy of the Award**

The award of $20,000 to Patillo's

unlawful killing should be reversed because it shocks the conscience, Del Casal v. Eastern Airlines, Inc., 634 F.2d 295, 302 (5th Cir. Unit B 1981), and is inadequate as a matter of law. The award minimizes the value of human life, the most precious right guaranteed by the Constitution. For wrongful death awards in similar Section 1983 cases, see, e.g., Bell v. City of Milwaukee, 746 F.2d 1205, 1238-41 (7th Cir. 1984) (affirming an award of $100,000 in compensatory damages to the estate of a 23 year old unmarried man unlawfully killed by police); McQurter, 572 F.Supp. at 1422-23 (awarding $150,000 in compensatory damages to estate of 25 year old married man unlawfully killed by police); Roman v. City of Richmond, 570 F.Supp. 1554, 1556-57 (N.D.Cal. 1983) upholding jury award of $1.5 million to heirs of man

unlawfully killed by police); Guyton v. Phillips, 532 F. Supp. 1154 at 1168 (N.D. Cal. 1981) (awarding $100,000 in compensatory damages to the estate of 14 year old killed by police). The inadequacy of the award is highlighted by the fact that it is less than the $25,000 we affirmed in Trezevant v. City of Tamps, 741 F.2d 336, 341 (11th Cir. 1984), to a man who had been denied medical treatment during his twenty-three minutes of incarceration.

As the Supreme Court has recognized, "Section 1983 presupposes that damages for actual harm ordinarily suffice to deter constitutional violations." Stachura, 477 U.S. at 309, 106 S.Ct. at 2544. The district court's award of $20,000, by failing to adequately compensate for Patillo's life, turns this assumption on its head and ignores the

deterrent value of an award of damages under Section 1983.

IV. **CONCLUSION**

After eight long years of litigation, this Section 1983 lawsuit draws to a close. Unfortunately, the district court had an "inverted view of the law," and the ending can only be characterized as "justice turned bottom side up." Anti-Fascist Committee v. McGrath, 341 U.S. 123, 186, 71 S.Ct. 624, 656, 95 L.Ed.2d 817 (1954) (Jackson, J., concurring). Because the district court erred in not applying Section 51-4-1 to determine the damages for Patillo's unlawful killing and because its award of $20,000 was inadequate as a matter of law, I respectfully dissent.

Supreme Court, U.S.
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No. 88-2002

In The

Supreme Court of the United States

October Term, 1988

EMMA F. GILMERE,

Petitioner,

v.

CITY OF ATLANTA, GEORGIA,
R. C. SAMPSON and C. C. CRAIG,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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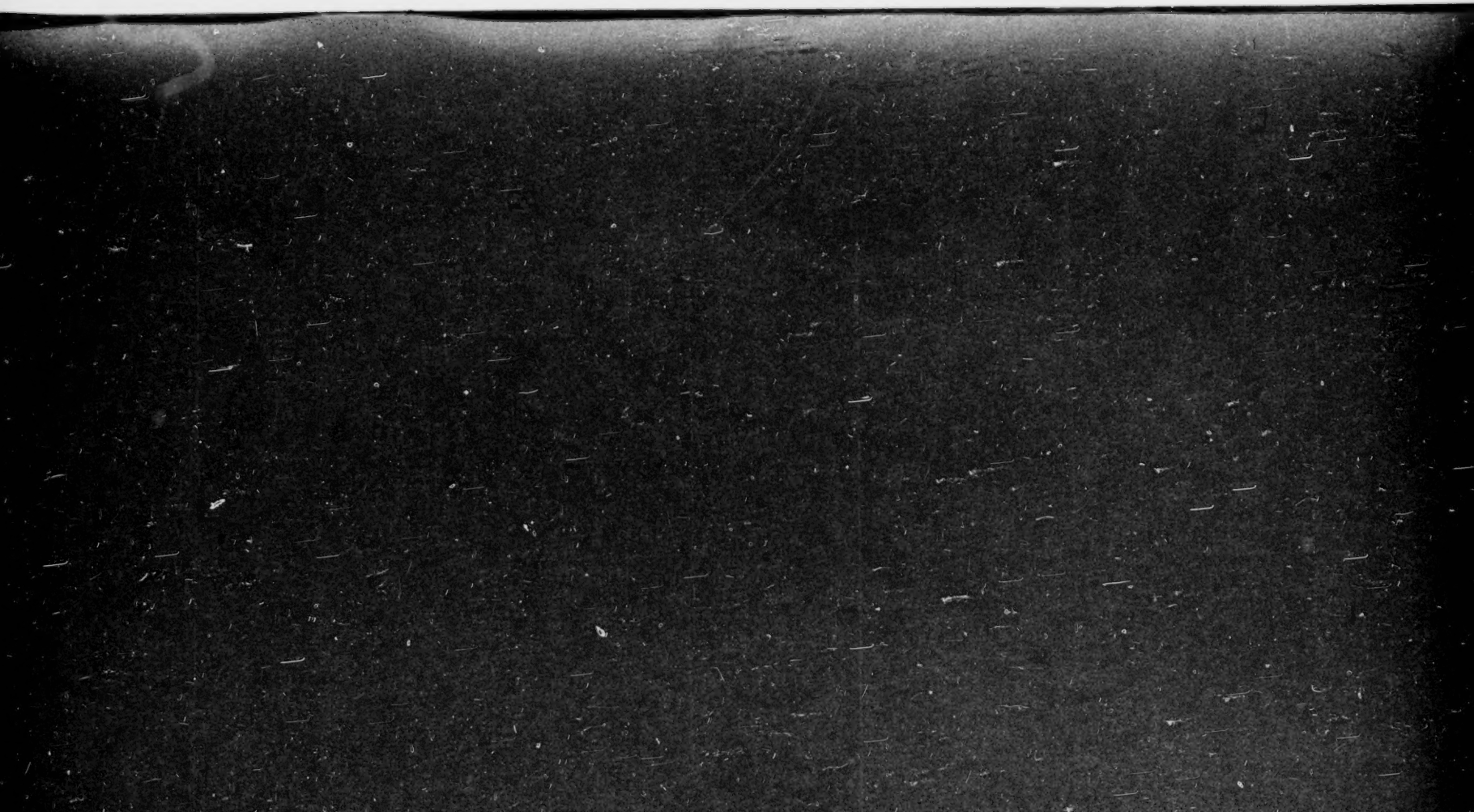

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No. 88-2002

In The

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EMMA F. GILMERE, individually and as Administratrix of the Estate of Thomas E. Patillo and for the benefit of his next of kin,

Petitioner,

v.

CITY OF ATLANTA, GEORGIA, R. C. SAMPSON and C. C. CRAIG, individually and in their official capacity,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, City of Atlanta, Georgia, and R. C. Sampson, respectfully request that this Court deny the petition for writ of certiorari, which seeks review of the Eleventh Circuit's opinion in this case. That opinion is reported at 864 F.2d 734 (1989).

STATEMENT

The facts recited in the petition for certiorari are, to a great extent, at variance with the findings of fact of the district court, which have been upheld on appeal by the Eleventh Circuit. Those findings of fact are set forth in full in Appendix I to the petition, and are summarized below. Respondent R. C. Sampson and C. C. Craig, officers of the Atlanta Bureau of Police Services, encountered petitioner's decedent, Thomas Patillo, at his home in response to a citizen's report that Patillo had threatened that citizen with a gun (Pet. 3a). The officers ordered Patillo to their police cars for questioning (Pet. 6a). Patillo, who was very drunk (Pet. 10A), attempted unsuccessfully to flee. The officers then escorted him forceably across a parking lot and, according to eyewitnesses, hit him about the head (Pet. 8-9a). As the three men reached a point between two parked cars, Patillo tried once more to break away, and reached for the revolver of one of the officers (Pet. 14a). Although reports of what happened next differed sharply, the trial court found that the revolver was knocked to the ground during a scuffle. *Ibidem*. Patillo then broke free and lunged toward Officer Sampson, who reacted by drawing his own revolver and shooting Patillo fatally. *Ibidem*. The trial court further found that Officer Sampson was attempting to protect himself, and was acting in subjective good faith (Pet. 39-40a) when he shot Patillo, but that his belief that his life was in danger was not reasonable (Pet. 41a). This finding resolves the "major factual hurdle" devised by the petitioner in footnote 2 to the petition. The remainder of the discussion within petitioner's footnote 2 contains mere inferences from matters never brought before the court below, nor properly presented for this Court's consideration.

As a matter of law, the trial court held that the respondents Sampson and the City of Atlanta had intentionally deprived Patillo of a protected liberty interest, the right to be free from the infliction of unnecessary physical force by state officers against one's person, and that this deprivation occurred both when Patillo was struck about the head and when he was shot. The trial court construed petitioner's pleadings as not claiming damages for the deprivation of Patillo's life (Pet. 75-89a).

Respondents Sampson and the City of Atlanta appealed this decision to the United States Court of Appeals for the Eleventh Circuit, and the petitioner cross-appealed. A three-judge panel of the appellate court reversed the trial court as to the finding of liability against the City of Atlanta, and held that the petitioner's action against the police officers did not state a claim under 42 U.S.C. § 1983 because the deprivation, although under color of state law, was caused by a random and unauthorized state act for which prior process is impracticable or impossible, and because post-deprivation remedies under state tort law were available to provide redress for the beating and the shooting. *Gilmere v. City of Atlanta*, 737 F.2d 894 (11th Cir. 1984).

A suggestion for rehearing *en banc* was filed on behalf of the petitioner, and was granted. On October 15, 1985, the United States Court of Appeals for the Eleventh Circuit entered an order by which it affirmed the district court's holding that respondent Sampson and Officer Craig were liable for beating Patillo in violation of his constitutional rights, that Sampson was liable for shooting Patillo in violation of his constitutional rights, and that their supervisors were not liable under federal law for the officers' misconduct. The court reversed the finding of municipal liability, and remanded for further consideration of the petitioner's state law claims. The award of costs

and attorneys fees was vacated and remanded for further consideration. *Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Cir., 1985).

Both the petitioner and respondent Sampson applied to this Court for a writ of certiorari. The petitioner's application at that time raised two of the issues contained in the pending Petition No. 88-2002: whether the courts below erred in failing to mandate the award of state statutory damages for the wrongful death of the petitioner's decedent, and whether an established municipal policy resulted in the death of and injuries to the petitioner's decedent, by which policy the City of Atlanta should have been held liable (*See*, Petition No. 85-1335). Both petitions were denied by this Court. *See, Gilmere v. City of Atlanta*, 476 U.S. 1115 (1986), and *Sampson v. Gilmere*, 476 U.S. 1124 (1986).

On remand, the trial court declined to award additional damages against respondents Sampson and Craig. The Court of Appeals for the Eleventh Circuit affirmed the damages award, and remanded the case for reconsideration of attorneys fees. It is the failure of the Court of Appeals to compel the award of additional damages, and to hold the City of Atlanta liable, which gives rise to the petition now pending before the Court.

REASONS WHY THE PETITION SHOULD BE DENIED

1. *Facts Unique to This Case Render Inappropriate a Review of the Relevance of Georgia's Wrongful Death Statute to the Measure of Damages to be Awarded for a Section 1983 Claim*

The petitioner has raised two arguments for compelling the courts below to use Georgia's wrongful death statute[1] in determining the amount of damages to compensate her for the deprivation of the decedent's constitutional rights. The first is that binding precedent mandates the use of the state's statutory framework for awarding damages for federal claims. The second is that she properly pleaded a pendent state claim for wrongful death which itself would have authorized the award of damages under Georgia's wrongful death statute. These arguments are premised on issues unique to this case that do not warrant review by this Court.

The circumstances of her case and her own election of remedies, not the misapplication of federal law, form the basis of the ruling which the petitioner asks this Court to review. By her own election, the petitioner failed to plead a state cause of action for wrongful death, which failure deprives her of an arguably automatic[2] application of the Georgia measure of damages for wrongful death.

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[1] Georgia law permits recovery of the "full value of the life of the decedent" in actions for wrongful death. Official Code of Georgia Annotated §§ 51-4-5(a) and 51-4-1.

[2] The application of the wrongful death statute's measure of damages would not, as petitioner implies, have inevitably followed a determination that a pendent state cause of action for wrongful death had been stated. Had the cause of action for wrongful death been properly pleaded, sovereign immunity could have been raised as a defense by the City of Atlanta, pursuant to

This issue of pleading and practice was the subject of careful analysis by the trial court and by the Court of Appeals. The resolution of such an issue adverse to the petitioner does not raise a substantial federal question for this Court.

Whether the courts below were compelled to use the Georgia wrongful death statute as the measure of compensation for deprivation of federally-derived rights was an issue also determined by the petitioner's particular circumstances. While the trial court properly used as guidance the holding in *Carey v. Piphus*, 435 U.S. 247 (1978), that one of the purposes of Section 1983 is to provide compensation to citizens wronged by the deprivation of their constitutional rights, it went on to examine closely the application of that holding to the circumstances at hand. Those circumstances included the fact that the decedent's next of kin did not depend on him for financial support (Pet. 82a). The trial court's determination of damages was based on its calculation of adequate compensation to the decedent's estate for the constitutional rights violation the decedent suffered at the hands at the respondent police officers. *Ibidem*. The petitioner does not contend that the determination of adequate compensation is not within the trial court's discretion and authority. Indeed, cases cited by the petitioner show that state statutory frameworks for damages will be bypassed by federal courts, when necessary, to achieve adequate compensation to the victims of violations of constitutional rights (Pet. 27); *See, Bell v. City of Milwaukee*, 746 F.2d 1205, 1238 (7th Circuit 1984). It is the trial court's calculation of what is adequate compensation under the circumstances of this case, and not the applicable legal principle, with which the petitioner quarrels. The calcu-

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Official Code of Georgia Annotated § 36-33-3, and "official" immunity could have been raised by the officers. *See*, Official Code of Georgia Annotated § 36-33-4; *Craft v. Preble*, 182 Ga. App. 429, 355 S.E.2d 746 (1987).

lation undertaken in this case, which was reviewed at length and affirmed by the Court of Appeals (Pet. 119a-134a), does not present a substantial federal question for review by this Court.

2. *The Issue of the City of Atlanta's Liability, Having Been Reviewed Four Times on the Appellate Level, Presents No Substantial Important Federal Question*

The petitioner's argument that the judgment against respondent police officers should be made payable by the City of Atlanta steadfastly ignores well-established precedent that the liability of a governmental entity cannot be based solely on the theory of respondeat superior. *Monell v. Department of Social Services*, 436 U.S. 658 (1978). The judgment in favor of the City of Atlanta in this case was determined by the Eleventh Circuit on appeal, and affirmed twice. *See, Gilmere v. City of Atlanta*, 737 F.2d 894 (11th Cir., 1984) (vacated); on rehearing 774 F.2d 1495 (11th Cir., 1985); *Gilmere v. City of Atlanta*, 864 F.2d 734 (11th Cir., 1989). It was also the subject of the petitioner's previous application for writ of certiorari. *See*, No. 85-1335, *Gilmere v. City of Atlanta*, 476 U.S. 1115 (1986) (cert. denied). Most recently, as acknowledged by the petitioner, the Eleventh Circuit characterized pursuit of this argument as "frivolous." Petitioner asks this Court to order the City of Atlanta to pay the judgment, all costs and attorneys fees awarded in this case, despite the fact that the City was specifically held not to be liable to the petitioner. There is simply no law that supports such a proposition, and no important federal, or indeed, legal, question is presented to this Court for review on this issue.

3. *Petitioner has Failed to Present her Petition With Brevity, in Accordance With the Rules of This Court.*

Respondents point out that the text of the petition presented in this application for certiorari exceeds the maximum number of pages, as set out in Rule 21.4 of the Rules of the Supreme Court of the United States, by at least thirteen pages, and that Rule 21.5 makes such failure to present the petition with brevity a sufficient reason for denial. The respondents ask this Court to consider such failure as sufficient reason for declining to review this case.

CONCLUSION

The petition for writ of certiorari in No. 88-2002 should be denied.

Respectfully submitted,

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APPENDIX

OFFICIAL CODE OF GEORGIA ANNOTATED

§ 36-33-3. A municipal corporation shall not be liable for the torts of policemen or other officers engaged in the discharge of the duties imposed on them by law.

§ 36-33-4. Members of the council and other officers of a municipal corporation shall be personally liable to one who sustains special damages as the result of any official act of such officers if done oppressively, maliciously, corruptly, or without authority of law.

§§ 51-4-1. As used in this chapter, the term:

(1) "Full value of the life of the decedent, as shown by the evidence" means the full value of the life of the decedent without deducting for any of the necessary or personal expenses of the decedent had he lived.

(2) "Homicide" includes all cases in which the death of a human being results from a crime, from criminal or other negligence, or from property which has been defectively manufactured, whether or not as the result of negligence.

§ 51-4-5. (a) When there is no person entitled to bring an action for the wrongful death of a decedent under Code Section 51-4-2, 51-4-3, or 51-4-4, the administrator or executor of the decedent may bring an action for and may recover and hold the amount recovered for the benefit of the next of kin. In any such case the amount of the recovery shall be the full value of the life of the decedent.

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NO. 88-2002

IN THE
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Respondents

REPLY BRIEF OF PETITIONER ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Respondents

REPLY BRIEF OF PETITIONER ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Emma F. Gilmere, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered March 6, 1989, reported at 864 F.2d 734 (11th Cir. 1989).

REASONS FOR GRANTING THE WRIT

1a. This Court's most recent rulings mandate that state statutory damages be awarded in deprivation of life claims brought under 42 U.S.C. §1983.

In its most recent ruling this Court again unanimously held, as it has consistently done, that "gaps in civil rights acts should be filled by state law, as long as that law is not inconsistent with federal law." Hardin v. Straub, ____ U.S. ____ (1989) No. 87-7023, 45 Cr.L. 3069, 3070. Citing Wilson v. Garcia, 471 U.S. 261, 271 (1985), the Court held this borrowing of state statutes "is based on a congressional decision to defer to 'the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action.'" Hardin, supra 45 Cr.L. at 3070. This

Court further held in Hardin, that the lower courts should not "unravel" applicable state laws "unless their full application would defeat the goals of the federal statute at issue." Id.

The Hardin[1] Court goes on to say that a decision to ignore the state statutory scheme can only be done when the state statutory scheme frustrates §1983's goals of compensation and deterrence. Certainly, here, the state

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[1] In a footnote the Hardin Court noted that just last term in Felder v. Casey, 487 U.S.____,____ (1988) that it reiterated that "'the central objective of the Reconstruction-Era civil rights statutes...is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief.' Burnett v. Grattan, 468 U.S. 42,55 (1984). Thus, §1983 provides 'a uniquely federal remedy against incursions...upon rights secured by the Constitution and laws of the Nation,' Mitchum v. Foster, 407 U.S. 225, 239 (1972), and is to be accorded 'a sweep as broad as its language." United States v. Price, 383 U.S. 787, 801 (1966)."

statutory scheme on damages in wrongful death cases does not frustrate the compensation and deterrence factors in §1983 awards. In fact it is the holding of the courts below, in choosing to ignore the state statutory scheme, that frustrates §1983.

Thus, the state damage remedy would be the appropriate reference point for in determining damages for the deprivation of life in a §1983 claim. Carey v. Piphus, 435 U.S. 247 (1978). In fact this Court has indicated that damages for deaths resulting from a violation of §1983 are the same as damages under a state wrongful death statute "where the 1983 damages claim is based upon the same injuries." Jones v. Hildebrandt, 191 Colo. 1, 550 P.2d 339 (1976), cert. dismissed as improvidently granted, 432 U.S. 183, 189 (1977).

Both the district court and the most recent panel decision of the Eleventh Circuit went on at great length to give their interpretation of a proper measure of damages in §1983 cases. However, these courts completely ignored the body of Georgia law that has carefully considered all applicable factors in fashioning s state damage remedy in wrongful death cases.

Primarily this Court should consider that this issue is present in this case, not by Plaintiff's inartful pleading, but by the district court's misreading of the law. In its original order the district court said it could not award wrongful death damages because under state law the next of kin did not have such a cause of action. (Appendix I 59a) It is only when Plaintiff filed a motion to alter or amend the original judgment to point out

the district court's complete misreading of the Georgia law that the district court held that a wrongful death cause of action had never been pled or tried. (Appendix II 90a)

As the distict court belatedly admitted, Georgia law clearly provides that the next of kin have a cause of action for wrongful death. O.C.G.A. §51-4-1,5. But the "dependency" theory advanced by the district court for denying damages for the full value of the life of the decedent has been expressly rejected by the Georgia courts and the legislature in enacting O.C.G.A. §51-4-1,5. See Eldridge, Ga. Wrongful Death, §10-42.

In refusing to award state statutory damages the lower courts in this case looked only to the compensation principle totally ignoring that Georgia law has

already held that "the half forgotten and rarely emphasized purpose of the wrongful death act was to deter homicide, whether criminal or negligent, by imposing a heavy civil penalty upon the tortfeasor." Eldridge, supra at §10-43.

> The statute is, however, one that is intended to inflict a punishment upon wrongdoers who bring about the death of a human being by negligence. **** The General Assembly has a right to impose upon a wrongdoer any penalty suitable, as a punishment for the wrong he has committed, unless such punishment is prohibited by some constitutional provision."

Savannah Electric Company v. Bell, 124 Ga. 663, 53 S.E. 193 (1905). Similarly, the full value of life concept is rooted in the common law and provides adequate compensation while creating a penalty but not allowing punitive damages as allowed in other torts. Engle v. Finch, 165 Ga. 131, 134, 139 S.E. 868 (1927). The

theory behind assessing damages for the full value of a life was set out in Southern Railway v. Decker, 5 Ga. App. 21, 62 S.E. 678 (1908).

The basis for determining damages under the Georgia statutory scheme is the full value of the life, that is the yearly income or projected economic worth of the deceased times the life expectancy. Miller v. Tuten, 137 Ga. App. 188, 223 S.E.2d 237 (1976). But the "full value of the life" is something more than the present cash value of the earnings of a lifetime of services of a lifetime; it also encompasses certain intangibles which may have no ascertainable value except to the deceased and to the plaintiff" Smith v. McBride, 119 Ga. App. 94(1), 166 S.E.2d 407 (1969).

Thus, the policies underlying the

state statutory scheme authorizing compensation are not in conflict with the policies underlying §1983 compensation, and so, should have been followed by the lower courts.

1b. Respondents totally misrepresent the record, just as the lower courts have, in claiming that a wrongful death cause of action was not pled and tried.

Respondent's Brief in Opposition summarizes its argument in this respect by saying: "This issue of pleading and practice was the subject of careful analysis by the trial court and by the Court of Appeals." (Brief of Respondent, p.6) However, both the district court and the Eleventh Circuit panel completely ignored the facts of the case and created their own to support their erroneous conclusions.

First, it must be noted that the

pleading of the wrongful death claim would never have been an issue, except that the district court, after ruling that Plaintiff had prevailed on the wrongful death claim, ruled that it could not award state statutory damages because state law prohibited the next of kin from bringing such an action. (Appendix I, 59a) Plaintiff then filed a motion to alter or amend the judgment pointing out that Georgia law did allow the next of kin to recover for wrongful death. See O.C.G.A. §51-4-1,5. It was after the filing of this motion that the district court admitted its mistake but then found a new way to deprive Plaintiff of wrongful death damages by creating its "finding" that Plaintiff did not plead a wrongful death cause of action. (Appendix II, 90a)

Second, the panel says that: "There

is no indication in the complaint that the appellant intended to raise a pendent claim for wrongful death." Gilmere, supra 864 F.2d at 737. Plaintiff alleged the wrongful death claim in Count I of her complaint, along with the constitutional claims, the same as other cases in this district have pled the wrongful death claim. See e.g., McQurter v. City of Atlanta, 572 F. Supp. 1401 (N.D. Ga. 1983), aff'd. 724 F.2d 881 (11th Cir. 1984). Assault, battery, false imprisonment, etc., are lesser claims pled in the event that Plaintiff does not prevail on the main claim - wrongful death. Paragraph 23 of the complaint stated: "The Plaintiff has suffered the loss of her brother and is entitled to recover damages for the wrongful death." (R12) Paragraph 24 of the complaint states: "(T)he defendant's actions are

the proximate cause of the death of THOMAS E. PATILLO and the Plaintiff is entitled to recover the full value of his life, funeral and medical expenses and damages." (R13)

Third, the panel found that "counsel for appellees" specifically objected to the wrongful death claim at trial. Well, the record shows that neither the City of Atlanta, Defendant Sampson, the City officials sued nor their attorneys made any such objection. (T1315, 1380) The objection that was made was made by counsel for Craig, the only Defendant not represented by the City of Atlanta attorneys. (As pointed out in the Petitioner's certiorari petition Defendant Craig has never filed any appeal in this case.) The other Defendants did not join in this objection at trial. And in fact, the attorney for

Craig, who did make the objection at trial, later clarified that his objection was that there was no prayer for wrongful death damages and that Ms. Gilmere was not the property party Plaintiff (T1373), and then later admitted that a wrongful death cause of action was pled in the case. (T1368) More importantly neither counsel mentioned this objection in their directed verdict motions or in their response to Plaintiff's proposed findings of fact, or in any other pleading. (T1355-1372)

Fourth, and more importantly, this objection as to whether the case stated a wrongful death claim was overruled by the trial Court, when the court finally said to the repeated objection on another issue that it intended to hold the parties to the causes of action set out in the Proposed Findings of fact and

Conclusion of Law which the Court required to be filed before trial in lieu of a pre-trial order. (T1350) Plaintiff's proposed findings mentioned the wrongful death claim at least three times, including the statement that :" The pendent state claim for wrongful death falls on the next of kin." (R152) Again in Plaintiff's motion for directed verdict, Plaintiff stated: "Plaintiff has proved by a preponderance of the evidence the requisites of the pendent state claims of wrongful death *** and the constitutional violation of wrongful death." (R133)

Fifth, the panel's indication in a footnote that their decision might be different "had the survivors sought recovery for their injuries" shows a complete lack of knowledge of Georgia law as to practice and procedure. Gilmere,

supra 864 F.2d at 739. However, Georgia law specifically excludes a suit by the survivors for their injuries. Bell v. Sigal, 129 Ga. App. 249, 199 S.E.2d 355 (1973) See Eldridge, supra at §10-47: "The full value of life does not include grief, mental pain and suffering by the beneficiary; it does not include loss of society, company, companionship, or consortium of the deceased; it does not include for the loss of the deceased providing for the wants and needs of the beneficiaries." In Georgia only the father of a deceased minor child has a separate cause of action for the loss of services of a decedent. Daughtry v. Stubbs, 119 Ga. App. 429, 167 S.E.2d 233 (1969).

2. The most recent rulings by this Court mandate that the municipal entity be held responsible for the damages, costs and attorney's fees

awarded against municipal officers acting in their official capacities.

In light of Will v. Michigan Department of State Police, ____U.S.____ (1989), No. 87-1207, 45 Cr.L. 3087, this Court should grant certiorari to make explicit what this court said in Kentucky v. Graham, 473 U.S. 159, 167 (1985) that: "Only in an official capacity action is a Plaintiff who prevails entitled to look for relief, both on the merits and for fees, to the government entity." (emphasis supplied.)

Here, the prevailing plaintiff is effectively left without a remedy because the district court will not order fees, costs or the damage award to be paid by the municipality. The Defendants-respondents have refused to pay the judgment and have successfully shielded the wages of the Defendants-employees

Sampson and Craig from garnishment. See City of Atlanta v. Gilmere, 252 Ga. 406 (1984).

The acts of Defendants Sampson and Craig were carried out in their official capacities. The district court specifically found that "(t)here can be no doubt that Craig and Sampson were acting in their official capacities as Atlanta police officers." (Appendix I 30a) The in banc Eleventh Circuit found that the officers were acting in their official capacities and that the killing resulted from the officer's "improper use of his official power." Gilmere v. City of Atlanta, 774 F.2d 1495, 1501 (11th Cir. 1985) (in banc).

Therefore Plaintiff contends that the issue is controlled by this Court's decision in Brandon v. Holt, 469 U.S. 464, 468 (1985) which held that: "In at

least three recent cases arising under §1983, we have plainly implied that a judgment against a public servant 'in his official capacity' imposes liability on the entity he represents, provided, of course, the public entity receives notice and an opportunity to respond. We now make that point explicit." The Court's decision therein cites Hutto v. Finney, 437 U.S. 678 (1978) where a judgment against an official was ordered to be paid out of state funds. Accord Odum v. Clark, 748 F.2d 1538, 1542 (11th Cir. 1984).

Instead of ordering the City to pay the lower courts here have in fact said the City should not pay and cannot be made to pay. Indeed, the Eleventh Circuit panel simply dismissed Petitioner's claim to make the City pay as "frivolous". Gilmere, supra, 864 F.2d

at 742. In fact that Eleventh Circuit panel mischaracterized Petitioner's attempt to force the City to pay as a request to impose liability on the City.

In light of the lower courts' total disregard for the rulings of this court, and in light of Will v. Michigan Department of State Police, supra, this Court should grant certiorari and make it clear that in official capacity actions that municipal entities must be held accountable.

3. Petitioner's brief is in compliance with the rules of this Court.

Apparently the Respondents are totally unaware of Rule 33.3, Rules of the Supreme Court, that says, in relevant part, that where documents are produced by photostatic or similar process a Petition for Certiorari will be limited

to 65 pages and a reply brief to 20 pages.

CONCLUSION

Petitioner calls upon this Court to correct a great injustice by the courts below that have ruled that a black man's life, who was murdered by the police, is worth only $20,000. If not addressed by the Court, the ruling below will leave civil rights litigants with a tenuous remedy in civil rights cases, allowing each court to fashion a remedy on a case by case basis, based on the whim and caprice of the fact-finder. Thomas Patillo was unlawfully killed on January 1, 1980. Justice demands that not only that there be adequate compensation, but that such compensation be actually paid in order to deter future wrongdoing.

_____

J.M. Raffauf

CERTIFICATE OF SERVICE

I hereby certify that I have served this Reply Brief upon the Respondents-Defendants by mailing three copies on July , 1989 to:

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